

IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION

4 RICHARD ROGERS, individually, and on ) Docket No. 19 C 3083  
5 behalf of similarly situated )  
6 individuals, )  
7 Plaintiffs, )  
8 vs. ) Chicago, Illinois  
9 BNSF RAILWAY COMPANY, ) September 6, 2022  
Defendant. ) 2:00 o'clock p.m.

TRANSCRIPT OF PROCEEDINGS  
BEFORE THE HONORABLE MATTHEW F. KENNELLY

## APPEARANCES:

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## 1 APPEARANCES CONTINUED:

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1 (The following proceedings were had by video: )

2 THE CLERK: 19 C 3083, Rogers v. BNSF Railway.

3 THE COURT: This is Judge Kenneally. We're proceeding  
4 by video because the courthouse is closed.

5 I want to get everybody's names on the record to  
6 start off with, and then I want to talk about how we're going  
7 to go about doing this. Why don't we start with having  
8 everybody on the plaintiff's side please give your names.

9 MR. LOEVEY: Good afternoon, your Honor. Jon Loevy  
10 for the plaintiffs.

11 THE COURT: Mr. Kanovitz, you're muted.

12 MR. KANOVITZ: Thank you. Good afternoon. Mike  
13 Kanovitz for the plaintiff.

14 MR. MEYERS: Good afternoon. Evan Meyers for  
15 plaintiff.

16 MR. GERBIE: Good afternoon. David Gerbie on behalf  
17 of the plaintiff.

18 MR. DUFFNER: Good afternoon. Brendan Duffner on  
19 behalf of the plaintiff.

20 THE COURT: All right. I think that's everybody on  
21 plaintiff's side. Defense counsel.

22 MS. HERRINGTON: Good afternoon. Beth Herrington on  
23 behalf of Defendant BNSF.

24 MR. DIAMANTATOS: Your Honor, good afternoon. Tinos  
25 Diamantatos, also on behalf of BNSF.

1                   MR. FOUTS: Greg Fouts on behalf of BNSF.

2                   MS. CHAPLA: Good afternoon, your Honor. Claire  
3 Chapla on behalf of BNSF.

4                   THE COURT: So I'm going to ask you a favor. So I'm  
5 obviously at home because the courthouse was closed. And I  
6 was having some problems on my laptop this morning with Webex.  
7 My camera kept cutting out; so that means I have to do this on  
8 my iPad. Unfortunately, all of my notes and materials on the  
9 motions in limine are also on my iPad. iPads do split  
10 screens, but they get really small. What I'm going to ask you  
11 to do is if you're not going to be presenting argument, please  
12 turn off your camera. That way I don't have 15 pictures on a  
13 tiny little sliver of my device here.

14                  So what I want to do is just a couple of comments  
15 generally just to reiterate something I said I think in the  
16 order that I entered yesterday that I want to talk about the  
17 motions in limine and motions to strike. Then we'll talk  
18 about some other logistical stuff.

19                  First of all, we've been given a start date of the  
20 4th of October. I know that -- at least I think that a  
21 religious holiday starts that evening, Yom Kippur. I'm going  
22 to need to know at some point whether that is an issue, in  
23 other words, proceeding on, I guess, it would be Wednesday is  
24 going to be an issue for anybody on either trial team. And  
25 we'll have to figure out whether we just take a day off or

1 work around it or whatever. Just have that in mind. I want  
2 to circle back to that at the end.

3           Secondly, I'm pretty sure, though not a hundred  
4 percent positive, that we're going to be in my regular  
5 courtroom, which is on the 21st floor. So to the extent that  
6 I was going to do kind of a walk through today, it really  
7 isn't terribly complicated. I can talk you through some of it  
8 at the end, and then maybe later in the week this week or  
9 maybe even sometime early next week, we can have maybe some  
10 subset of you all come over to the courtroom. And I can kind  
11 of show you physically how things are going to be set up.  
12 I'll do my best to talk through that at the end today.

13           So before we jump into the motions in limine, are  
14 there any settlement-related developments of any note that I  
15 should know about before we start spending a huge amount of  
16 time on this?

17           MR. LOEVY: Not from the plaintiffs' side, your  
18 Honor.

19           MS. HERRINGTON: Not from defense either.

20           THE COURT: This is the point at which I need people  
21 who aren't going to be presenting argument to flip off your  
22 cameras. You can turn them off and on. If you're going to  
23 argue motion 9 or something, you can turn it back on then.

24           We're going to start off with the ones filed by the  
25 plaintiffs. Number 1 is entitled Motion to Bar Reference to

1 Actual Or Liquidated Damages.

2 So, you know, the defense cites this case called  
3 *Watson* in its response. *Watson* expressly doesn't say anything  
4 about damages. They say we're not going to say anything about  
5 damages. So this comment in a footnote where there's an  
6 opinion about it being discretionary really doesn't have much  
7 of a bearing on an issue that we have here, which I think the  
8 issue is whether the statute calls for a set amount or whether  
9 it's an amount up to that amount. That's what it seems to me  
10 like the issue is. The plaintiff is arguing that for each  
11 violation, it's depending upon whether the violation is  
12 knowing or reckless or not, it's a certain amount, and  
13 otherwise, it's a different amount. Whereas, the defendants I  
14 think are arguing that, essentially, it's up to whatever the  
15 amount is in the statute.

16 Am I understanding the defendant's argument  
17 correctly?

18 If you're saying something, you're muted.

19 MR. DIAMANTATOS: Very good. Yes. Thank you.  
20 Apologies about that. Yes, your Honor, I will be arguing this  
21 one on behalf of the defense.

22 We do object to the plaintiffs' motion in limine,  
23 your Honor. Our position, as you stated it, Judge, it's  
24 really just -- if I can unpack it a little bit.

25 THE COURT: I'd actually rather you just directly

1 answer my question first because we got about 17 motions in  
2 limine, and I don't got 17 times 20 minutes. Okay? So let's  
3 start off with my question.

4 MR. DIAMANTATOS: Sure. Our position is that the  
5 damages award is discretionary, not mandatory, and that's for  
6 the members of the jury to decide.

7 THE COURT: What does that mean? Does that mean it's  
8 anywhere from zero to, let's say, a thousand for a violation  
9 under 20, part 1, with the jury to decide a specific amount?  
10 Or does it mean something other than that?

11 MR. DIAMANTATOS: It means that exactly, your Honor.

12 THE COURT: How do we expect -- how is the jury  
13 supposed to decide the specific number if they find a  
14 violation? The jury instruction that you -- that the defense  
15 provided on this basically gives them no clue. It doesn't  
16 even say what the standard is. So how is the jury supposed to  
17 decide what the right number is?

18 MR. DIAMANTATOS: Well, the members of the jury, your  
19 Honor, will hear, of course, that if they find that there was  
20 a negligent violation that they may award up to \$1,000.  
21 That's what the statute says. If they find and the plaintiffs  
22 prove reckless conduct that they may award up to \$5,000. And  
23 the ultimate decision will be up to the members of the jury to  
24 collectively deliberate on what they heard during the course  
25 of the trial.

1                   THE COURT: Time out. Did you hear my question?

2                   MR. DIAMANTATOS: Yes, your Honor, I did.

3                   THE COURT: Let's try answering it.

4                   MR. DIAMANTATOS: Well, Judge, as --

5                   THE COURT: Do you want to try again?

6                   MR. DIAMANTATOS: No, your Honor. I understand your  
7 question.

8                   THE COURT: In a case about emotional distress, we  
9 ask the jury to put the value on emotional distress. In a  
10 case about pain and suffering, we ask a jury to place a value  
11 on pain and suffering. There's nothing in your proposed jury  
12 instructions that tells them how they're supposed to go about  
13 deciding whether it's 0, a thousand, \$459.29, or something in  
14 between. So how are we supposed to decide that? What are the  
15 criteria?

16                   MR. DIAMANTATOS: Your Honor, as I think with many  
17 cases where there aren't specific instructions that describe  
18 for the members of the jury, they hear the totality of the  
19 evidence. They decide what damages, if any, they may award.  
20 Here, it's our position that there is a statutory cap as to --

21                   THE COURT: Respectfully, respectfully, in other  
22 types of cases, we're at least telling them what the injury or  
23 harm is that they're awarding the damages for. We're telling  
24 them it's emotional distress. We're telling them it's pain  
25 and suffering. We're telling them it's loss of a normal life.

1 We're telling them it's lost income.

2                   Here we're not telling them anything, at least in the  
3 way you guys have written your proposed jury instructions.

4 We're just telling them, come up with a number from one to a  
5 thousand.

6                   MR. DIAMANTATOS: Well, here, the members of the  
7 jury, Judge, would be deciding whether or not there was a  
8 violation by BNSF specifically as it relates to the biometric  
9 statute and that that statute provides certain statutory  
10 damages. So, respectfully, your Honor, we think that there is  
11 a framework, that the members of the jury are going to have to  
12 collectively decide what conduct BNSF engaged in, whether the  
13 plaintiffs have proved that conduct. And, number one, was it  
14 negligent conduct? Or, number two, was it reckless conduct?  
15 And then the statute itself provides the framework; that  
16 there's a thousand-dollar ceiling for negligent, if the  
17 plaintiff proves its case as to BNSF and a \$5,000 --

18                   THE COURT: Where do you get ceilings, caps, and up  
19 to? None of that language is in the statute.

20                   MR. DIAMANTATOS: Well, the statute itself, your  
21 Honor, uses language. And if we just look at the straight  
22 statutory construction here as it relates to the BIPA statute,  
23 you know, terms like "must" and "may" argues. So that's a  
24 clear indication on the face of the statute itself that the  
25 drafters of the statute intended that there be discretion as

1 it relates to the damages.

2 THE COURT: But it doesn't say that the jury may  
3 award damages. It says a prevailing party may recover. And  
4 then for each of the subparts, it gives two alternatives. It  
5 says liquid damages of a thousand dollars or actual damages,  
6 whichever is greater. It doesn't say liquid damages of up to  
7 a thousand dollars or whichever is greater. And it doesn't  
8 say that the jury may award. It just says a prevailing party  
9 may recover.

10 I guess I'm having a -- is there any other statute  
11 that you've been able to find in Illinois law that reads this  
12 way that would be interpreted in the way you're proposing?

13 MR. DIAMANTATOS: No, your Honor. I think that what  
14 -- the statute language that you just read, Judge, Statute 20  
15 of BIPA, which says, "a prevailing party may recover for each  
16 violation"; that the use of that term "may" indicates that  
17 there is discretion there in terms of what a party may have to  
18 pay as part of a BIPA violation.

19 THE COURT: But the "maybe" doesn't relate to what  
20 somebody has to pay, and it doesn't relate to the jury. It  
21 relates to the prevailing party. It basically gives -- it  
22 basically gives them an option between liquidated and actual,  
23 whichever is greater.

24 MR. DIAMANTATOS: If you compare that, your Honor, to  
25 the first sentence in BIPA Section 20 where the Illinois

1 legislature specifically used the phrase where it says, "any  
2 person agrees violation of this act shall have a right of  
3 action in the state court," and it goes on.

4 So it's our position that the legislature, in  
5 drafting this particular statute, makes it clear that when it  
6 intends to use the word "shall" and that there's no discretion  
7 there that it does so. And then as it relates to damages,  
8 there may be recovery. And as your Honor pointed out, there's  
9 various statutory amounts depending on the conduct that the  
10 plaintiffs have the burden of proving.

11 THE COURT: That would mean then attorneys' fees, if  
12 the plaintiff prevails, are optional too.

13 MR. DIAMANTATOS: That's right, your Honor.

14 THE COURT: Okay. That's pretty close to insane.  
15 I'm just going -- I just have to say it that way. That's  
16 pretty close to insane.

17 Yeah. Okay. Let me hear from the plaintiff on this.

18 MR. DIAMANTATOS: Your Honor, if I may.

19 THE COURT: No, let me hear from the plaintiff on  
20 this.

21 MR. KANOVITZ: Judge, if you look at the damages  
22 provision, it uses several important terms. One is  
23 "liquidated damages." That term has a meaning under the law,  
24 which is a pre-set measure of damages that relieves a party  
25 from the burden of having to prove damages under circumstances

1 where proof may be difficult or uncertain. There's no  
2 liquidated -- up to a certain amount of liquidated damages  
3 because liquidated damages fixes the amount. It has the term  
4 "whichever is greater," which clearly shows that if we decide  
5 not to pursue actual damages, we can pick the greater of the  
6 two, which we are exercising our option to pursue only the  
7 liquidated damages.

8 And then outside of that provision, we have what the  
9 Illinois Supreme Court has told us in the *Six Flags* case,  
10 which is that a lot of thought went into this section by the  
11 general assembly and that the general assembly wanted people  
12 to be able to seek a remedy without needing to prove the  
13 actual damages because that was the most effective means of  
14 obtaining enforcement in a circumstance where you're dealing  
15 with a new technology where the damages could happen long  
16 after the violation and the general assembly was looking to  
17 get compliance and enforcement.

18 THE COURT: Mr. Diamantatos, really short.

19 MR. DIAMANTATOS: Yes, your Honor. First I'll talk  
20 about the *Rosenbach* decision, and then I'll circle back to a  
21 point your Honor mentioned earlier.

22 The plaintiff, when citing to *Rosenbach*, the question  
23 that was certified to the Illinois Supreme Court in that case  
24 was whether one qualifies as a, quote/unquote, aggrieved  
25 person under Section 20 of BIPA and may seek liquidated

1 damages and injunctive relief pursuant to BIPA if she has not  
2 alleged some actual injury or adverse effect beyond violation  
3 of her rights under the statute.

4 The Illinois Supreme Court, of course, answered that  
5 question yes, and the Court in *Rosenbach* looked to the plain  
6 and unambiguous statutory language and concluded that the  
7 legislature's choice of the word "aggrieved" convinced that  
8 intent to allow anyone to sue based on a private entity's  
9 failure to comply with BIPA, even if that person suffered no  
10 additional harm or consequences from the statutory violation.

11 The *Rosenbach* court reasoned that this enforcement  
12 mechanism was integral to implementation of the legislature's  
13 objectives when private entities face liability for failure to  
14 comply with BIPA's requirements without requiring affected  
15 individuals or customers to show some injury beyond violation  
16 of their statutory rights. Those entities have the strongest  
17 possible incentive to conform with the law and prevent --

18 THE COURT: (Indecipherable).

19 MR. DIAMANTATOS: -- before they occur. So  
20 *Rosenbach*, your Honor, showed an aggrieved party may file suit  
21 under BIPA, even if they were not harmed. But to be clear,  
22 *Rosenbach* did not hold, your Honor, and it's not followed from  
23 the decision that --

24 THE COURT: I wouldn't say that it holds that. Okay.  
25 Look, I don't think the defendant's reading of the statute is

1 sustainable. As Mr. Kanovitz said, the term "liquidated  
2 damages" has an established meaning in the law. It means a  
3 fixed amount. That's the way I think the statute reads too.  
4 The jury is going to determine a number of violations. And  
5 it's going to determine level of intent, if any. It's not  
6 going to determine the amount. The Seventh Amendment has  
7 nothing to do with this. It's no different from any other  
8 statute in which there is a fixed statutory penalty.

9 MR. DIAMANTATOS: Your Honor, this is another  
10 statute. You asked for an analogy. And I do have an analogy,  
11 to the extent it's helpful to your Honor.

12 THE COURT: Yeah.

13 MR. DIAMANTATOS: So if you look to, for example, the  
14 Fair Labor Standards Act at Section 216(b) of that act.

15 THE COURT: I asked for an Illinois statute.

16 MR. DIAMANTATOS: I understand, your Honor. It's a  
17 federal statute to the extent it doesn't help shed any light  
18 on this.

19 THE COURT: I don't think it helps. I made a ruling.

20 Motion No. 2 has to do with some exhibits. It sounds  
21 like 800 pages or something like that that it sounds like are  
22 recently obtained or downloaded by the plaintiff on the  
23 defendant's web page. So one of the things that the plaintiff  
24 argues in response to this motion is that these materials  
25 should have been produced earlier. And I'm really not seeing

1 much of a response to that point by the defendants, or much in  
2 the way of addressing -- I'm sorry. This is -- let me make  
3 sure I got the right side's motion. This is part of the  
4 problem having this so tiny.

5 This is plaintiffs' motion number 2. My apologies.  
6 Not defendant's motion number 2. The other one was  
7 plaintiffs' motion number 1.

8 Back to my point. The plaintiff says this material  
9 should have been produced by the defendants in response to  
10 discovery requests. I'm not seeing a whole lot of a response  
11 by the defendants to that point. So can somebody address that  
12 particular point, please.

13 MR. DIAMANTATOS: Yes, your Honor, Tinos Diamantatos  
14 for BNSF. I will address that.

15 And this, your Honor, really touches on three  
16 different motions in limine, this particular issue, two from  
17 the plaintiff, and one --

18 THE COURT: There's a bunch of them that are linked  
19 together. I get that.

20 MR. DIAMANTATOS: That's right, your Honor. So I  
21 think just some pertinent facts here as they relate to your  
22 Honor's decision on this particular motion.

23 Before the conclusion of fact discovery, Judge, which  
24 was close to two years ago as your Honor knows, you allowed  
25 the parties ample time to engage in fact discovery. The

1 plaintiffs produced 141 pages of discovery. Candidly, on the  
2 eve of trial -- and we lay this out in our papers, beginning  
3 in mid August.

4 THE COURT: Stop. Look, I'm going to say this again  
5 for the second and the last time. I don't have unlimited time  
6 to devote to this. We've got about 17 or something like that,  
7 maybe it's 19 motions in limine. I don't have unlimited time  
8 to devote to this. I want my questions answered directly  
9 first thing out of people's mouth. That seems to me to be a  
10 relatively elementary point.

11 So I get that the plaintiff only recently produced  
12 this. But ordinarily a party doesn't have to produce the  
13 other side's documents. And what the plaintiff is saying is  
14 that these are the defendant's documents that the defendant  
15 should have produced under discovery requests. So I want a  
16 response to that particular point, that the plaintiffs'  
17 contention that the defendant should have produced these  
18 documents pursuant to the plaintiffs' discovery requests.

19 If you don't answer that in the next -- I mean, you  
20 deal with the judges, right? Generally speaking, we do not  
21 get our questions answered. It's common.

22 MR. DIAMANTATOS: Your Honor --

23 THE COURT: It's par for the course.

24 MR. DIAMANTATOS: -- I understand.

25 THE COURT: I'm not done talking. The first time it

1 happens, you chalk it up to somebody's got their talking  
2 points. The second time it happens, you start wondering. And  
3 the third time it happens, you figure they don't have a viable  
4 answer. Okay? So I'm about there.

5 So let's talk about my question. Thanks.

6 MR. DIAMANTATOS: Your Honor, they're publicly  
7 available documents. First of all, for the most part, of  
8 those 880 pages, they are publicly available. They are from  
9 the Internet. They are not from custodians in this case. So  
10 the notion that defendants --

11 THE COURT: All of the discovery, purely discovery  
12 from custodians in the case, there was no obligation to  
13 produce anything beyond something that was held by some  
14 agreed-upon custodian? Is that what you're saying?

15 MR. DIAMANTATOS: No, your Honor. But when you look  
16 to these documents, the materials that plaintiffs have  
17 produced, they are publicly available website information,  
18 your Honor.

19 I'm sorry. Did you have a question, Judge?

20 THE COURT: I get it. I'm saying yes. I get that.

21 MR. DIAMANTATOS: Yes. And what the plaintiff says  
22 is that because the defendant produced certain demonstrative  
23 photographs and web pages that the plaintiff then went out and  
24 started looking for this information and found these 880 pages  
25 of, again, website information, information that was not from

1 any identified custodian, information that did not come up  
2 during the course of fact discovery, which closed some time  
3 ago, and then dumped it on the defense on the eve of trial to  
4 say these are now exhibits they want to use, substantively,  
5 not for demonstrative purposes.

6 THE COURT: Let me walk through how I look at this.  
7 So if I ask -- if party one asks party two during discovery,  
8 produce all of your policies and procedures relating to X.  
9 Okay? And there's a policy and procedure relating to X on a  
10 publicly available website, unless there's some understanding  
11 that we don't have to produce documents from your website or  
12 that you only have to produce documents from certain sources  
13 that don't include the websites, for example, custodians A  
14 through X, then the proposition that it's publicly available  
15 is not an answer to the notion that it should have been  
16 produced during discovery.

17 There's all sorts of things that are publicly  
18 available that still have to get produced during discovery.  
19 So that doesn't get me very far. I asked you a direct  
20 question because there was this reference in the response to  
21 there wasn't a custodian. So I asked you a direct question  
22 about whether discovery was limited to e-discovery from  
23 certain custodians, and you immediately told me no. So that  
24 means that that's off the table.

25 And I get how this got discovered. Okay? I get how

1 it got discovered. It was because you had this other exhibit,  
2 which you're referring to as a demonstrative. And the  
3 plaintiff says they went and looked for it. I mean, they were  
4 pretty up front about when they found this. But I go back to  
5 kind of the basic point.

6 So if -- under Rule 37(c)(1), if something is  
7 produced late, it's excluded unless it's justified or it's  
8 harmless. So if -- if these are materials that ought to have  
9 been produced by the defendant during discovery, then the  
10 plaintiffs' late production of the defendant's own materials  
11 is almost by definition justified. Okay?

12 So I give you one more shot at why I shouldn't just  
13 make that finding right now and move on to the next thing.

14 MR. DIAMANTATOS: Well, your Honor, it's our position  
15 that there is no justification for the late production of  
16 these documents. Again, this is plaintiffs' case. And to the  
17 extent that they found information on BNSF's website that they  
18 believe speaks to the issues of the case, why was that not  
19 addressed by the plaintiffs during the course of discovery?

20 THE COURT: It seems to me that's the wrong question.  
21 It seems to me the first question is, if it was responsive to  
22 a document request by the plaintiff, why didn't the defendant  
23 produce it? I mean, unless you can show me something in your  
24 document request responses that says we're not producing  
25 anything that's on our website, you know, it would have to be

1 in the response, by the way, which, you know, that went on for  
2 several pages about this particular point.

3 MS. HERRINGTON: If I might jump in, your Honor.  
4 Some of these are -- they predate the class period.

5 THE COURT: Was there some agreed-upon limitation as  
6 to -- you said that in the response too. Was there some  
7 agreed-upon time limitation regarding discovery?

8 MS. HERRINGTON: Well, we did when we objected --  
9 yes. Yes.

10 THE COURT: What was it?

11 MS. HERRINGTON: Throughout the class period, 2014.

12 THE COURT: So there was an agreed-upon limitation of  
13 discovery for things that arose during the class period.  
14 That's what you're telling me.

15 MS. HERRINGTON: There was an objection by BNSF, and  
16 it was left uncontested by plaintiff.

17 THE COURT: So you said in your responses, we're only  
18 producing documents going back to the beginning of the class  
19 period and plaintiff never came in and contested that. That's  
20 what you're saying?

21 MS. HERRINGTON: Correct.

22 THE COURT: Let me ask the plaintiff about that.  
23 Does anybody want to dispute what Ms. Herrington just said?

24 MR. KANOVITZ: Judge, as you know, we came into the  
25 case --

1                   THE COURT: You know, don't start telling me we're  
2 late comers to the ball game. That's part of what you pick up  
3 when you come in.

4                   MR. KANOVITZ: Understood. I would like to ask the  
5 counsel that was in the case before.

6                   THE COURT: I don't care who answers. Mr. Meyers,  
7 Mr. Gerbie, I don't care. Whoever. Is Ms. Herrington right  
8 that they put a limitation on what they were producing and  
9 nobody came in and contested it?

10                  MR. GERBIE: Your Honor, I don't believe that that's  
11 entirely accurate. I believe some documents were produced  
12 that predated the class period.

13                  THE COURT: We're going to move on to my next  
14 question, which is a follow-up to that. So which of these  
15 documents predate the class period? And what I mean by  
16 predate the class period is they would not have been on the  
17 website at any point during the class period. Which of these  
18 documents would fall within that description?

19                  MS. HERRINGTON: Judge, to be fair, I don't know  
20 which they got from a website and which they got from other  
21 places. There are things called annual reviews. I'm just  
22 looking. It's a lot of documents. Pictures of Warren  
23 Buffett. BNSF tweets/online materials, news releases.  
24 There's a lot of stuff here.

25                  THE COURT: Listen, there's no tweets from 2011

1 because not too many people were --

2 MS. HERRINGTON: I think you're right. But I'm just  
3 looking at the 800 pages. There's a lot of stuff here. I  
4 don't know that we were able to find it all on the website; so  
5 I'm not sure where they got it.

6 THE COURT: We can come back to that. Now I want to  
7 turn to the other part of 37(c)(1).

8 I mean, there's a general statement in the response  
9 that any time you get documents late in the ball game, it's  
10 harmful. And I get that. But I think in making a  
11 determination of whether something is harmful or harmless, I  
12 need to know a little bit more than that.

13 You folks all have an advantage over me. I don't  
14 know how particular things fit into particular people's cases.  
15 So I need somebody on the defense side to articulate to me how  
16 you were harmed by the use of basically the defendant's own  
17 documents, which Mr. Diamantatos told me about six times were  
18 publicly available. So tell me how the defendant's harmed by  
19 that.

20 MR. DIAMANTATOS: Well, I think the ability, your  
21 Honor, to use those particular documents --

22 THE COURT: Let me rephrase my question. Don't give  
23 me a general platitude. Give me something specific.

24 MR. DIAMANTATOS: We have no idea how the plaintiffs  
25 plan on -- through which witness, what is their theory as it

1 relates to these documents, all things that become explored,  
2 of course, Judge, during the course of depositions when we  
3 have these exhibits available to us. We can see how the  
4 plaintiffs are using them.

5 The reason I started with the numbers, Judge, is  
6 because that matters. When you're analyzing harm under 37(c)  
7 when we had 141 pages of documents during the course of  
8 depositions to understand how the plaintiff is using these  
9 documents, what's their theory, what --

10 THE COURT: Time out. You're not telling me you --  
11 you can't tell me with a straight face that the defendant  
12 thought that the plaintiffs' universe of exhibits for use for  
13 trial was going to consist of the 140 pages they produced in  
14 discovery. I mean, in any kind of a case like this, you know  
15 to a moral certainty it's going to be the defendant's  
16 documents that are the ones that are used. You're not trying  
17 to tell me that you thought that the plaintiffs' total  
18 universe of exhibits was going to be 140 pages, are you?

19 MR. DIAMANTATOS: I'll tell you, your Honor, we fully  
20 did not expect that four times that number --

21 THE COURT: Thanks for changing my question. Which  
22 I'm just going to note that you did. You changed my question.  
23 I'll take that as a no, we didn't expect it was going to be  
24 140 pages they produced.

25 Somebody on the plaintiffs' side needs to tell me how

1 these documents are going to be used. Go.

2 MR. KANOVITZ: So in each of these documents, there's  
3 essentially a single page where BNSF is claiming that it is  
4 responsible for the biometrics. The language differs, you  
5 know, given -- on a particular document, but it's quite clear  
6 what we're using it for.

7 THE COURT: I'm talking about that's what it's for.

8 MR. KANOVITZ: Yes.

9 THE COURT: So presumably anything outside the class  
10 period anyway wouldn't be all that terribly significant or  
11 probative, let's say, in the words of Rule 403.

12 MR. KANOVITZ: I think it would be probative,  
13 because, for example, in the 2011 report or the 2013 report  
14 might be where they're saying, we installed the gates because  
15 we want to get truckers through faster.

16 THE COURT: Okay. So now you know. All right? By  
17 the way, I wouldn't have had to ask anybody about this in a  
18 deposition. So now you know how they're going to use the  
19 documents.

20 Tell me how you're harmed.

21 MR. DIAMANTATOS: The fact that they were produced,  
22 your Honor, just a few short weeks before trial.

23 THE COURT: Okay. We're going to come back to  
24 number 2.

25 Next is number 3 by the plaintiff. This has to do

1 with these three exhibits, which I think it's photographs from  
2 the facility, screen shots from the Remprex website, and then  
3 some YouTube videos uploaded by Remprex.

4 So you refer to these as demonstrative exhibits, and  
5 that means different things when said by different people. So  
6 I need to know exactly how it is that the defense is planning  
7 to use these exhibits at the trial.

8 MR. DIAMANTATOS: Yes, your Honor. I will address  
9 that. We plan on using the photographs and the group exhibits  
10 simply to aid the witness who will be testifying about the  
11 facilities. As that witness is describing certain things that  
12 presumably the members of the jury have never visited, a  
13 secure location, it's purely for demonstrative purposes.

14 THE COURT: They're going to point to this; they're  
15 going to point to that.

16 MR. DIAMANTATOS: When he describes certain machinery  
17 or where the gates are, that's why those photographs are  
18 there, solely to aid in the presentation of that witness'  
19 explanation of those areas to the members of the jury.

20 THE COURT: You know that "demonstrative" means the  
21 jury doesn't get it during deliberation, right?

22 MR. DIAMANTATOS: Correct. We don't anticipate --

23 THE COURT: Talk to me about the videos.

24 MR. DIAMANTATOS: The videos, your Honor, and the  
25 Remprex information, we also don't plan on using that

1 substantively. We plan on using it for impeachment purposes  
2 with some of the witnesses that we anticipate the plaintiffs  
3 may call during the course of this case, including individuals  
4 from Remprex. And throughout the course of cross-examination,  
5 to the extent that those documents or YouTube videos speak to  
6 certain things that those witnesses are testifying about as it  
7 relates to Remprex, we anticipate to use them for impeachment  
8 purposes only and, again, not for substantive reasons. That's  
9 it.

10 THE COURT: I'll just point out -- not that it's  
11 harmful to you in this situation -- that "impeachment  
12 purposes" and "demonstrative" mean two different things. But  
13 I will tell you that under the pretrial order rules, as  
14 they've existed since before I was a lawyer -- I'm not going  
15 to go into how long ago it is now; it's a number with four,  
16 more than one digit, put it that way -- you haven't had to  
17 disclose exhibits that are going to be used solely for  
18 impeachment. That's never been part of the pretrial order  
19 rules. That doesn't obviate somebody from the need to  
20 disclose them for discovery.

21 Just talk to me a little bit about how it is that  
22 you -- I mean, I think part of the objection here is that they  
23 got produced relatively late in the ball game as well. So can  
24 you just kind of talk to me about how that happened.

25 MR. DIAMANTATOS: Judge, it's similar to how you

1 described it a few moments ago that during the course of trial  
2 preparation, once we received from the plaintiff what we'll  
3 call the witness list, we saw that their case relies, in large  
4 part, on Remprex. As we're preparing and looking at the  
5 publicly available Remprex information, like the YouTube  
6 videos and website, we decided to pull certain information.

7 And your Honor, of course, is correct. We know we  
8 don't have to disclose exhibits that we plan on using for  
9 impeachment purposes, to the extent that that becomes  
10 something that we need to do at trial. But in abundance of  
11 caution, we decided to do it anyway. We included it with this  
12 group of demonstratives, the photographs, and that was it.

13 THE COURT: Time out.

14 Let me hear from the plaintiff on this one.

15 MR. DIAMANTATOS: Yes, your Honor.

16 MR. KANOVITZ: Judge, these documents go way beyond  
17 anything I've seen called a demonstrative and, in fact, are  
18 substantive evidence.

19 So, for example, they want to show the kiosk. Well,  
20 the kiosk has -- and these are repeated pictures, a big  
21 Remprex sticker on it. Now, we know that at different points  
22 in time, it didn't have a Remprex sticker on it. But their  
23 purpose, pretty clearly, is to say this is associated with  
24 Remprex. The purpose in the videos that Remprex created about  
25 how a truck goes through is to show this is what Remprex is

1 doing. There's pictures from the office with people like  
2 right next to a Remprex sign or a piece of paper on a bulletin  
3 board.

4 THE COURT: And these are videos of the site or sites  
5 at issue in this case?

6 MR. KANOVITZ: No. It's just --

7 THE COURT: I have one side shaking up and down, and  
8 I got the other side shaking back and forth.

9 MR. KANOVITZ: From what I saw, these are simply like  
10 an accident reconstructionist-type video that somebody would  
11 make. It's a cartoon.

12 THE COURT: Let me ask defense counsel. Are these --  
13 I haven't seen the things, obviously. Are these actual videos  
14 from a site that is at issue in the case?

15 MR. DIAMANTATOS: I think there's two kind of  
16 separate ones, your Honor. The photographs of the kiosk, they  
17 were taken at a facility, the Corwith facility that's here in  
18 Illinois, right? So that it is pertinent and the witnesses  
19 who will be testifying about what --

20 THE COURT: I'm asking about the videos.

21 MR. DIAMANTATOS: The videos here are not specific to  
22 a particular location is my understanding, but, again, these  
23 are materials that Remprex has put out there pretty much  
24 universally to show the services that they offer and how they  
25 operate.

1                   THE COURT: Mr. Kanovitz was saying a second ago that  
2 the -- again, I haven't seen these things -- that the videos  
3 have kind of Remprex's logo and signs and identifying  
4 information all over the place. Do we have actual photographs  
5 of the actual sites and whatever that are at issue in this  
6 case so we know whether those kinds of photographs -- whether  
7 those kinds of logos and names, et cetera, appear there?

8                   MR. DIAMANTATOS: Yes, I'll tackle that, Judge. Yes,  
9 we do. We have the videos, as you described them, the Remprex  
10 cartoon videos; and then you have actual photographs that we  
11 took in preparation of trial at the Corwith facility, which is  
12 one of BNSF's facilities here in Illinois, that shows  
13 photographs of those logos and the kiosk locations that, of  
14 course, the members of the jury can --

15                  THE COURT: So, Mr. Kanovitz, you're telling me  
16 there's some material difference between the amount or  
17 prominence of the Remprex logos on the actual stuff as opposed  
18 to in these videos? Is that what you're telling me?

19                  MR. KANOVITZ: What I'm saying is the purpose is to  
20 show the location of this or that. They don't need  
21 pictures --

22                  THE COURT: I got that before. That's why I didn't  
23 ask that. I asked what I just termed my question.

24                  MR. KANOVITZ: I'm sorry, Judge. Could you repeat  
25 it?

1                   THE COURT: Right. Okay. I've said this probably  
2 more times in my career that this is not one of those Sunday  
3 morning talk shows where everybody just comes in and says  
4 their talking points irrespective of what the questions are.  
5 You actually have to answer. I'm going to read it back to  
6 you.

7                   Mr. Kanovitz, you're telling me there are some  
8 material differences between the amount and prominence of the  
9 Remprex logos on the actual stuff as opposed to in these  
10 videos. Is that what you're telling me?

11                  MR. KANOVITZ: No, Judge. It's two separate things.  
12 The videos it's prominent, and in the pictures it's prominent.

13                  THE COURT: No, I'm talking about in the actual sites  
14 that are at issue in the case. Is their Remprex logos there?

15                  MR. KANOVITZ: I believe they picked a point in time  
16 in a certain site where it's more prominent than it might have  
17 been at other times. But because we only got it at this last  
18 second, we have very little with which to prove that.

19                  THE COURT: Okay. So you understand on the  
20 plaintiffs' side that a demonstrative means -- we've already  
21 discussed this. I guess I don't have to repeat it, but I  
22 will. It doesn't go into evidence. And, I mean, it seems  
23 like to me that if I'm going to let this in, what I would need  
24 to do, because it's pretty clear that one of the key contested  
25 issues in the case has to do with BNSF's responsibility as

1 opposed to Remprex's responsibility -- I mean, if there's  
2 anything that's a key issue in the case, it's that. I would  
3 have to give the jury some kind of a limiting instruction.

4           Would I have to do it when you're talking about the  
5 exhibits to say, ladies and gentlemen, you're going to see --  
6 you're going to see something that's not an actual video of  
7 anything in real life that's at issue in this case. It's got  
8 logos on it. You have to disregard those. That's not part of  
9 the evidence. This isn't part of the evidence. It's not an  
10 actual video. Any time you try to use this stuff, if I let it  
11 in, if I let you use it at all -- "let it in" is the wrong  
12 word. If I let you use it at all, I'm going to have to  
13 basically give that limiting instruction. So I assume that  
14 that's something you're willing to live with.

15           MR. DIAMANTATOS: Yes, your Honor. We're certainly  
16 okay with your Honor providing limiting instructions to the  
17 members of the jury about a limited use of a substantive  
18 exhibit or what a demonstrative is.

19           THE COURT: We're going to come back to number 3 too.

20           All right. Number 4 says, bar references and  
21 suggestions at trial that biometrics have not been collected.

22           Here's my problem with plaintiffs' motion number 4.  
23 It's basically a mini partial motion for summary judgment  
24 saying, don't allow argument on something that the plaintiff  
25 has to prove. I don't think that's a proper motion in limine.

1 So I'm going to deny it without prejudice to, you know,  
2 objections at trial or Rule 50 motion at the appropriate time,  
3 if you think that there's, you know, legitimate basis to find  
4 otherwise. So that's number 4.

5 Number 5 has to do with preemption. Okay. I want  
6 somebody on the defense side to listen really carefully to  
7 this question. Because I do not intend to repeat it. Is the  
8 defendant seriously arguing that federal preemption is an  
9 issue for the jury? Yes or no?

10 I can't hear you.

11 MS. CHAPLA: I apologize, your Honor. I was on mute.  
12 I said no.

13 THE COURT: Then why would you be putting in evidence  
14 about federal preemption in a jury trial?

15 MS. CHAPLA: Because, your Honor, we need to develop  
16 a factual record to support the affirmative --

17 THE COURT: But the jury -- why would one do that in  
18 front of the jury?

19 MS. CHAPLA: Well, your Honor, again, as I said, we  
20 need to develop the factual record to support --

21 THE COURT: Why put it in front of the jury? If it's  
22 not an issue for the jury, then why would you need to develop  
23 the record in front of the jury?

24 MS. CHAPLA: I think there's a distinction here  
25 between evidence relevant to preemption and evidence that is

1 relevant to preemption that is also relevant to other issues  
2 in the case that will be for the jury.

3 THE COURT: I'm not hearing anything about that in  
4 the arguments. Okay? The motion asked to bar references to  
5 federal preemption, and the response says: "We need to put  
6 this evidence in in order to make our record." So I'm going  
7 to make this real simple.

8 The ruling on the federal preemption was not some  
9 sort of a preliminary ruling. Go back and read it. I said at  
10 the end of each of the four sections, preemption does not  
11 apply. That's a ruling. I have made a ruling that preemption  
12 does not apply. You guys tried to take an interlocutory  
13 appeal on that, which, if it was a tentative ruling, you know,  
14 you wouldn't have even bothered to do. It's a final ruling.  
15 Evidence about preemption, argument about preemption does not  
16 come in during the trial, period. It's not an issue for the  
17 jury anyway, even if it was still an open, which it's not.  
18 Motion number 5 is granted.

19 Now we're on to motion number 6. Okay. And that has  
20 to do with arguments about safety and security.

21 So what I get collectively from the motions in limine  
22 on both sides is that each side wants to put in something  
23 about why BNSF has or Remprex or whoever it is or why BNSF  
24 contracted with Remprex to put in this system. Okay? And the  
25 defendant wants to put in it's all about safety and security.

1 The plaintiff wants to put in it's about moving things along  
2 and making more money and profits. So each side has got a  
3 motion in limine, and they kind of go like this, right past  
4 each other.

5 So can somebody tell me what issue or issues in the  
6 case -- and I'm really talking about two motions now; it's the  
7 corresponding one on the defense side -- that the reason for  
8 putting in the system or having the system or having it set up  
9 the way it's set up, the underlying reason for that, what  
10 issue does that bear on what the jury is going to have to  
11 decide in this trial starting on the 4th of October?

12 MR. LOEVY: From plaintiffs' side, your Honor, the  
13 answer is no issue. The issue is whether the statute was  
14 violated. The motive to violate the statute is probably  
15 neither here nor there. So that's why we responded to their  
16 motion.

17 THE COURT: Why did you guys then ask to object to  
18 their motion to keep out evidence about profit motive or  
19 whatever their motion said?

20 MR. LOEVY: We don't want to lose both ways, but our  
21 final word was, we see their point, and we agree that the  
22 better reading is what's relevant is whether the statute was  
23 violated, not why.

24 THE COURT: All right. That's the plaintiffs'  
25 answer. Let me hear from the defendant then.

1                   MS. CHAPLA: Your Honor, on the defendant's side, we  
2 think that this evidence is relevant primarily to BNSF's  
3 mental state and whether it violated the statute negligently,  
4 recklessly, or intentionally, which, of course, is an issue  
5 the jury would be asked to decide.

6                   THE COURT: So explain to me how the reason for  
7 putting in the system bears on whether the statute was  
8 violated negligently, recklessly, or intentionally.

9                   MS. CHAPLA: Because, your Honor, BNSF has to comply  
10 with a number of obligations under federal law that required  
11 it to have certain security measures in place at these  
12 facilities. This was not -- as plaintiffs I think will argue  
13 to the jury, this was not a profit-making enterprise. The  
14 system was put in place specifically to comply with security  
15 obligations and to control access to sites where hazardous  
16 materials pass through. And that is highly relevant to --

17                   THE COURT: But the plaintiff is not -- as I  
18 understand the plaintiffs' claims, and as I understood the  
19 plaintiffs' claims when I ruled on the motion for summary  
20 judgment, the plaintiff isn't arguing there can't be a system.  
21 The plaintiff is arguing that you violated the provisions of  
22 BIPA that relate to obtaining the information, how that's to  
23 be obtained, and what disclosures have to be made and whatnot.  
24 I mean, is there a claim in this case that -- by the  
25 plaintiff, as you understand it, that somewhere in their

1 complaint or in the pretrial order or something that they  
2 filed that indicates that they're saying there can't be a  
3 security system to begin with?

4 MS. CHAPLA: No, your Honor. But the purpose of this  
5 evidence about the safety and security issues is to show why  
6 biometrics in particular were used and why biometrics are such  
7 an effective means of controlling access to these sites for  
8 which hazardous materials pass.

9 THE COURT: What does that have to do with the issues  
10 the jury is going to have to decide on whether the statute was  
11 violated and whether and the level of intent for violating the  
12 statute. I get that BNSF needs to have, you know, security  
13 controls in letting people in and out of its yard, but that's  
14 not -- I don't understand what issue in the case that the jury  
15 is going to have to decide that relates to.

16 MS. CHAPLA: It's not that highly relevant, your  
17 Honor, to why BNSF retained Remprex in particular to handle  
18 access to its facilities and to collect biometrics. And the  
19 jury, I think, will be hearing a lot about what Remprex did  
20 and Remprex's operation of the autogate system. And it's  
21 important to provide context for why BNSF retained this  
22 third-party contractor in the first place with expertise and  
23 specialty in this area, which held itself out as an expert.

24 THE COURT: What's -- again, we just kind of keep  
25 coming back to the same question. What's the issue that the

1 jury has to decide that what you just said relates to? What's  
2 the issue? I mean, I can pull up your proposed jury  
3 instructions. Tell me what issue it relates to.

4 MS. CHAPLA: Again, your Honor, it relates to --

5 THE COURT: "Again" isn't working, right? You're  
6 getting that, right? So you're not answering my question.  
7 What issue in the case that the jury has to decide does it  
8 relate to that, you know, BNSF needed to have, you know,  
9 security systems, they needed to do biometrics, and they  
10 decided to hire Remprex? What issue in the case does that  
11 have to do with? Those are the things you just told me.

12 MS. CHAPLA: Whether BNSF acted recklessly or  
13 negligently in having the system in place.

14 THE COURT: That's not what recklessly relates to.  
15 Recklessly involves violating the statute. There's no  
16 contention -- at least the jury isn't going to be asked to  
17 decide whether BNSF recklessly put in a security system. The  
18 question is whether they recklessly, negligently, or knowingly  
19 violated the statute. And that would seem to have something  
20 to do with their awareness of the statutory requirements and  
21 whether they, you know, did or didn't take steps to comply  
22 with them. Not whether it was a good idea to have a security  
23 system to begin with or whether it needed to include  
24 fingerprints or finger scans or whatever the right lingo is.  
25 I'm just completely missing the point here.

1                   MS. HERRINGTON: If I might add, your Honor, it also  
2 goes to the very issue of who collected it, right? The  
3 parties are fighting over who collected it. Part of our  
4 explanation of who collected, that it was not BNSF, but it was  
5 Remprex, has to do with why did we have this contract? What  
6 were they going to do under it?

7                   And what they were going to do was they were going to  
8 collect information and keep that information. And without  
9 being able to discuss what the purpose of the contract was and  
10 what they were doing and why, we are hamstrung in arguing  
11 about who collected and who did not collect. And that's the  
12 very issue the jury is deciding.

13                  THE COURT: Okay. Respond to that last point, if  
14 somebody would, on the plaintiffs' side. This has a bearing  
15 on the -- what I'll call the control issue.

16                  MR. LOEY: Well, I was with Ms. Herrington when she  
17 said it bears on who collected it, but not why they collected  
18 it. And that's what this motion is about. You know, they can  
19 say, we have a contract. We hired Remprex, and they tried to  
20 push the blame to Remprex. What's that got to do with  
21 security or why?

22                  THE COURT: Okay. Ms. Herrington, you want to  
23 respond to that?

24                  MS. HERRINGTON: Yes. It's incredibly important.  
25 Why did we hire an expert? Why didn't we just hire anybody

1 off the street to do security? Because they're experts in  
2 security. And it goes to our explanation of who was doing the  
3 collection of the information and why. I think the context is  
4 incredibly important for the jury to understand why an expert  
5 was retained and why they were the ones doing any collection  
6 of information.

7 THE COURT: Give me just a second here. I'm just  
8 looking at some other part of the final pretrial order.

9 So I don't think that this evidence that's being  
10 discussed has any bearing on intent. I'm looking at the  
11 defendant's proposed jury instruction about intent, which is  
12 defendant's instruction number 3. I'm not saying I'm going to  
13 adopt that one, but it seems like an appropriate thing to look  
14 at since it's the defendant that wants to put the evidence in.  
15 The instruction is, generally speaking, worded pretty  
16 correctly.

17 "Defendant negligently violates BIPA if conduct of  
18 its employees failed to use care that a reasonably prudent  
19 person would use in the same circumstances" -- the next part  
20 is the important part -- "regarding the plaintiffs' rights  
21 under BIPA. Defendant recklessly violates BIPA, dot, dot,  
22 dot, if its conduct was in conscious disregard or utter  
23 indifference to" -- next point is important -- "plaintiffs'  
24 rights under BIPA. Same for intentionally."

25 None of this evidence reported in, whether it's a

1 good idea or bad idea, has anything to do with the intent  
2 issue. None. Zero. Zip. It's not relevant to that at all.

3 I can see the argument that evidence about -- that  
4 some limited, very limited amount of evidence about the reason  
5 why we hired Remprex is relevant on the question of control.  
6 So, in other words, if the point is something along the lines  
7 of, we have these very important safety obligations. We deal  
8 with hazardous materials. We deal with other dangerous stuff.  
9 We have to have these systems in place, and we hired a company  
10 that had expertise in that. This is how we know that they had  
11 the expertise, and we basically turned it all over to them,  
12 which I think is essentially the main thrust of the  
13 defendant's position. It seems to me that, to some very  
14 limited extent, references to safety and security are relevant  
15 and not unfairly prejudicial as it relates to that.

16 So I'm going to deny the motion, but really only in  
17 part. Because what I'm going to say about that is this.  
18 You're not going to get to repeat this over and over again.  
19 You're not going to get to dwell on it. It has a very focused  
20 and limited value. This is not a case about whether it's a  
21 good idea or a bad idea to have safety and security. It's not  
22 a case about whether it's a good idea or a bad idea for a  
23 company to make a profit. That's not what the case is about.

24 The case is about whether the practices violated this  
25 very specific statute and what, if any, the consequences of

1 that should be. So my very strong advice to the defendant is  
2 you have one witness talk about this, and you have him or her  
3 do that in a very focused way because probably the first time  
4 you get it in is going to be the last because that's when  
5 Rule 403 is going to kick in, given the limited probative  
6 value and the fact that this is not going to be turned into a  
7 trial whether safety is a good idea or not because that would  
8 run afoul of at least three of the negative parts of Rule 403.

9 So conversely on the plaintiffs' side, I'm not seeing  
10 this profit thing as being relevant at all. We'll come back  
11 to that one in a second.

12 So we're now going to move on to the other  
13 defendant's motion -- or plaintiffs' motion, rather.

14 The next one is these depositions. Okay. I really  
15 only had one question about this one, plaintiffs' motion  
16 number 7. On Ms. McRae, M-c-R-a-e -- actually, I have one  
17 question for the plaintiff, one question for the defendant.

18 The defendant says at page 12 of their response that  
19 after the emails from November of 2020 that you attach, there  
20 was a further email exchange or there was a further exchange  
21 in which BNSF supplemented its Rule 26(a) disclosures to  
22 include Ms. McRae and some general statement of the subject  
23 matter, and then there was a joint motion to extend the  
24 discovery cutoff to take her deposition. And I granted it,  
25 and then the plaintiff didn't take her deposition. And so

1 kind of the argument on Ms. McRae is you had your shot; you  
2 didn't take it. You shouldn't do it again less than a month  
3 before trial. Tell me why that argument is wrong.

4 MR. LOEVY: I think that argument is right, your  
5 Honor, and it's unfortunate. We, as a collective team, didn't  
6 appreciate that that was the full context, or we wouldn't have  
7 made that argument. Going back and looking at it, they're  
8 right.

9 THE COURT: Okay. So I guess I have -- is there  
10 anything else -- honestly, of the three people, in terms of  
11 the particular circumstances relating to them, McCabe was  
12 probably your best case. So you want to say anything about  
13 the other two, McCabe and Bass? Does the plaintiff want to  
14 say anything about those?

15 MR. LOEVY: On the plaintiffs' side, your Honor, you  
16 know, we stand on the same principle. You know, I agree with  
17 you that McRae was the strongest, but -- there's no prejudice.

18 THE COURT: I will say this. The Rule 26(a)(1)  
19 disclosures leave something to be desired, and by that I mean  
20 they're woefully insufficient. It basically says something  
21 along these lines. This person -- and this is true of all  
22 three -- has knowledge of the operations of the facility,  
23 quote/unquote. That's pretty woefully insufficient. But  
24 there was a pretty extended discovery period in this case, and  
25 nobody came to me and said -- nobody tried to get those beefed

1 up, at least to the extent it's not discussed in here. And  
2 nobody came to me and said, make them be more specific. So  
3 that was the chance. Motion number 7 is denied.

4 Back to number 2 and number 3 now. 2 being -- 3  
5 being the demonstratives -- or the so-called  
6 demonstratives/impeachment exhibits.

7 So I think -- so, first of all, the photograph sounds  
8 like, from what Mr. Diamantatos says, that that's actually  
9 going to be used as a legit demonstrative. It sounds like the  
10 other two are going to be used for impeachment. What I'm  
11 going to say -- and I would hope that by the time we try the  
12 case, people will have a little bit better idea of how the --  
13 let's just say the level of Remprex logoing on these exhibits  
14 compares with the level of Remprex logoing in real life.  
15 Anytime these things are used, there's going to be limiting  
16 instructions about that that basically tells the jury, hey,  
17 pay no attention to the Remprex stuff in here because it's not  
18 put up there as an actual depiction of what actually existed  
19 in this case. And so, you know, if you want to use these  
20 exhibits knowing that the judge is going to make a comment  
21 about them to the jury every time they're used, then I think  
22 you can do that. I think it's relatively harmless, and it  
23 doesn't seem like there was -- there's no indication that  
24 these, you know, ought to have been produced before.

25 So the motion in limine number 3 is denied with that

1 caveat.

2 I'm going to grant number 2, plaintiffs' number 2,  
3 which is to allow these exhibits, but that's subject to this  
4 limitation. If you can show me on specific things that they  
5 are outside the relevant time period in a way that renders  
6 them irrelevant or unfairly prejudicial, I'll deal with that  
7 when we get to the trial in the case. So I think that -- I  
8 think that under 37(c)(1), there's both a justification, and  
9 there's a significant amount of harmlessness here.

10 The justification is is that based on the argument  
11 I've heard today -- and I've asked all these questions several  
12 times -- it looks like these exhibits ought to have been  
13 produced before. But the fact that plaintiff is producing the  
14 defendant's own materials back to them later doesn't mean that  
15 that's unjustified.

16 And on the harmlessness issue, given the purpose for  
17 which they're going to be used, which is, basically, it sounds  
18 like to show sort of what I'll say quasi admissions -- I'm  
19 using air quotes there -- about whose system it was or who put  
20 it in or who had it put in. That's not going to hurt anybody  
21 in any unfair way at all. So 2 is granted. Yeah, 2 is  
22 granted.

23 So I think we are done with the plaintiffs'. We're  
24 going to move over to the defendant's.

25 Just in terms of time, we've done 7. We have 15 to

1 go. So we're going to move pretty quickly through these  
2 because a lot of them have kind of been talked about a little  
3 bit. Give me just a second to flip over and squint.

4 We're going to skip number 1, which I assume is  
5 probably the most significant one. That's why it's number 1.

6 Okay. Number 2 has to do with evidence of the  
7 party's financial condition. The plaintiff objects, but it's  
8 not clear exactly what -- to me what exactly the plaintiff  
9 wants to put in. So I need to know what exactly the plaintiff  
10 intends to put in that has something to do with the  
11 defendant's financial condition.

12 MR. LOEVY: Your Honor, what we would want to put in  
13 would be dependent on what they elicit. Generally we want to  
14 be able to show -- let me start again.

15 What we want to show is that BNSF has a tremendous  
16 amount of economic weight to throw around and that on the  
17 issue of bias and other issues, Remprex is essentially  
18 beholden to BNSF because of the vastly disproportionate market  
19 share. And BNSF is going to want to say, hey, we're a third  
20 party; they're a third party. They can say whatever they  
21 want. We want to show that Remprex is really dependent on  
22 BNSF because BNSF is like the planet around which everything  
23 revolves and has so much gravity that they cannot pretend --

24 THE COURT: Okay. I mean, just taking that at face  
25 value, why does that require you to put in anything about

1 BNSF's net worth or the fact that it's, you know, Berkshire  
2 Hathaway or Warren Buffett has some interest in it or  
3 whatever? I'm not getting the connection. I mean, I get  
4 that, you know, you can put in this is a really big contract  
5 for Remprex. It's worth a lot of money. It's an important  
6 contract to them. It's X percent of their business, or  
7 whatever, but what does that have to do with putting in  
8 evidence of BNSF's financial condition?

9 MR. LOEVY: BNSF -- the other bookend to that is not  
10 only the big contractor Remprex, but BNSF can control future  
11 contracts and is really the person in the industry -- the  
12 entity in the industry you have to keep happy.

13 Where I started, your Honor, was it really is  
14 somewhat dependent on how the trial folds out. We would be  
15 limiting our proof to what you said a minute ago which is, you  
16 know, they're a big deal, and this is a big contract. This is  
17 a big part of it, but we would want it without prejudice to a  
18 ruling that if the door is opened, that we could show, hold on  
19 a second, BNSF actually has a lot more weight than --

20 THE COURT: Defendant's motion number 2 is granted,  
21 subject to reconsideration if the defendant opens the door.  
22 And what you'll need to do, obviously, is just let me know  
23 outside the presence of the jury --

24 MR. LOEVY: Thank you, your Honor.

25 THE COURT: -- something has happened that causes

1 that, that relates to that.

2               Okay. 3 and 4, the plaintiff deals with them  
3 together. This has to do with evidence regarding -- I'm sorry  
4 I'm getting so close to the camera, but I have to squint to  
5 see the little tiny half of my iPad screen that I've got the  
6 papers on here -- evidence regarding data encryption and  
7 reference to identity theft or data breaches. And the  
8 plaintiff is arguing in response that those are -- that that's  
9 relevant on the question of recklessness or intent under BIPA  
10 Section 20. So I'd like to hear from the defendant in  
11 response to what the plaintiffs said on that one.

12               MS. HERRINGTON: Sure, your Honor. As your Honor  
13 knows, there's no data breach here. Fortunately, the data has  
14 not been compromised. There is no 15(d) claim or 15(e) in  
15 this case, 15(d) being, of course, disclosure, 15(e) being  
16 encryption. Any argument about, you know, data encryption is  
17 not relevant to a 15(b) claim. We're going to trial to  
18 determine if BNSF, you know, violated BIPA under 15(b), not  
19 (d) and (e). And trying to rouse the jury up suggesting that  
20 a data breach could happen or theft could happen or that it's  
21 somehow reckless that this Remprex database wasn't encrypted  
22 is only designed to just prejudice the jury.

23               THE COURT: The argument that's made, at least as I  
24 understand it, by the plaintiff is that in deciding the issue  
25 of -- I'll just use recklessness as a placeholder for the

1 various intent levels under Section 28 BIPA. In deciding  
2 recklessness, part of the calculus is the seriousness of the  
3 harm that might result if you're not careful. And part of the  
4 calculus, I suppose, would be the cost. And part of the  
5 calculus would be how difficult it is to, you know, put the  
6 measures in and whatnot.

7           But why isn't -- why isn't the risks that exist if  
8 the statute isn't complied with relevant it show recklessness;  
9 in other words, the level of the risk that the company has to  
10 deal with in order to -- in deciding how to deal with this  
11 data?

12           MS. HERRINGTON: Well, I think that we have to  
13 consider the section this is brought under. 15(e) deals  
14 directly with this on encryption -- not encryption -- the  
15 standard of care of storing something. The idea of whether  
16 15(b) was violated recklessly has nothing to do with whether  
17 or not we encrypted or that Remprex encrypted the database.

18           THE COURT: What's the part of 5(b) that you  
19 understand to be at issue here?

20           MS. HERRINGTON: 15(b) is whether or not --

21           THE COURT: Is it collecting? Is it capturing? Is  
22 it purchasing? Is it receiving? Or is it obtaining? Or is  
23 it all of the above? As you understand it.

24           MS. HERRINGTON: I think the plaintiffs are saying  
25 "collecting," but it's kind of been a moving target.

1                   THE COURT: Let me ask. Let me just ask the  
2 plaintiff on that. When you're arguing this case to the jury  
3 at trial, what part or parts of 15(b) are you relying on?

4                   MR. KANOVITZ: Not purchasing, but the rest of that  
5 phrase we think is intended to --

6                   THE COURT: Collecting, capturing, and receiving,  
7 basically.

8                   MR. KANOVITZ: Expansively.

9                   THE COURT: Just so it's clear, is it only a 15(b)  
10 violation that's at issue at this point?

11                  MS. HERRINGTON: Yes.

12                  THE COURT: And so if 15(b) says you can't -- I'll  
13 leave out the purchase -- you can't collect, capture, or  
14 receive, unless you do all of these things about informing the  
15 subject and getting releases and so on. Because that's what  
16 the case is about. The contention is is that BNSF collected,  
17 captured, or received and did not give the proper disclosures  
18 and warnings and get the proper releases. Right?

19                  MR. KANOVITZ: Yes.

20                  THE COURT: Okay. I'm just thinking here for a  
21 second.

22                  If I can just ask this. What's the thrust of the  
23 defense theory of the case on that going to be? It's going to  
24 be we didn't do it; we hired someone else to do it. Or is it  
25 going to be, we provided the necessary disclosures and got the

1 necessary releases? Or is it going to be some combination?

2 MS. HERRINGTON: Our defense, your Honor, is that we  
3 did not collect by any --

4 THE COURT: You didn't collect to begin with.

5 MS. HERRINGTON: We didn't do anything under (b).

6 THE COURT: The disclosure and release provisions  
7 don't apply because you didn't do anything that's covered by  
8 (b).

9 MS. HERRINGTON: Right. Because the private entity  
10 that did was Remprex.

11 THE COURT: I guess what I think about -- what I  
12 think about 3 and 4 is kind of similar to what I thought about  
13 the motion in limine on the other side relating to safety and  
14 security. I mean, it seems to me that there can be some, you  
15 know, general references to why this stuff is all important  
16 because this is data. And if it gets breached, it can be  
17 used, you know, in nefarious ways for identity theft or  
18 whatever. But it doesn't seem to me that given what's at  
19 issue in this case it's something that really can  
20 appropriately or should be dwelled upon. So I guess I'm going  
21 to say to you pretty much the same thing I said to the  
22 defendant on that point is that, you know, get it out, get it  
23 out in a relatively succinct way. On both sides of this, you  
24 can make reference to it in closing argument, but this  
25 isn't -- this isn't a case about whether -- about whether

1 safety and security and data collection are good or bad ideas.  
2 It's a case about whether particular provisions of the statute  
3 were violated. I guess I'm going to say that number 3 and 4  
4 are granted in part to the extent stated on the record.

5 References to fingerprints, that's number 5. So the  
6 way I'm reading the response and the -- particularly the  
7 reference to the plaintiffs' expert is that that expert is  
8 going to say that at least some of what is collected were  
9 fingerprints, quote/unquote?

10 MR. LOEVY: Correct.

11 THE COURT: Does the defense dispute that factual  
12 proposition; in other words, that the plaintiffs' expert is  
13 going to testify that some of what was collected were  
14 fingerprints?

15 MS. HERRINGTON: Some but not all.

16 THE COURT: Okay. So then why would it be irrelevant  
17 to let in testimony about fingerprints?

18 MS. HERRINGTON: I think it would be inaccurate to  
19 say that the entire class had their fingerprints -- that there  
20 were copies of it in the Remprex database.

21 THE COURT: I'm getting from the responses that  
22 nobody is going to say that each and every person had their  
23 fingerprints in there. Did I read the response wrong?

24 MR. LOEVY: No, your Honor.

25 THE COURT: Yeah. So motion in limine number 5 is

1 denied for that reason.

2 Number 6, reference to the number of times biometrics  
3 data was collected. So, look, the Seventh Circuit didn't  
4 decide this. Let me repeat that. The Seventh Circuit did not  
5 decide this in the Cothron case. They shipped it off to the  
6 Illinois Supreme Court. We're going to talk about that in a  
7 second.

8 As of right now, the number of times biometric data  
9 was collected is relevant for the reasons discussed in the  
10 response, and we may need to, you know, come up -- we do need  
11 to come up with a way to deal with, you know, what I'll call  
12 the Cothron issue -- C-o-t-h-r-o-n for the court reporter's  
13 benefit -- in the verdict form. But motion in limine number 6  
14 is denied because it's relevant, as the case sits right now.

15 Okay. Now we're down to number 7, which has to do  
16 with -- I think this is the same -- it's not clear to me, but  
17 I think this might be the same documents that we were already  
18 talking about a couple of minutes ago.

19 MR. DIAMANTATOS: Yes, your Honor. This is Tinos  
20 Diamantatos for BNSF. This is our motion to bar the 880  
21 some-odd exhibits that your Honor addressed in --

22 THE COURT: I mean, I ruled on that when I was ruling  
23 on the corresponding motion. I don't think we need to talk  
24 about it anymore.

25 Okay. Number 8 is to bar expert testimony on

1 ultimate issues. So the motion doesn't say exactly what the  
2 testimony is that the defendant wants to exclude. Can you  
3 please tell me.

4 MS. HERRINGTON: Yes, your Honor. Exclude their  
5 expert from getting up and saying that -- either that  
6 fingerprints are -- you know, collecting fingerprints are in  
7 violation of BIPA or that -- anything about the statute, tying  
8 the expert's testimony to the statute itself, which I don't  
9 believe is proper for an expert.

10 THE COURT: But that's why I asked you to be specific  
11 because pretty much anything an expert is going to do is going  
12 to tie something to the statute. And some of that may be  
13 okay, and some of it may not be okay, which is why I want to  
14 know specifically.

15 So you don't want the expert to testify that this is  
16 a violation -- that A, B, and C is a violation of BIPA. I  
17 would assume that pretty much everybody on the plaintiffs'  
18 side knows that and knows they can't do it, and they're not  
19 even going to try to elicit. Is there something beyond that  
20 that you're concerned about here?

21 MS. HERRINGTON: Precisely. Their expert shouldn't  
22 be able to offer an opinion about whether information  
23 collected by the Remprex AGS system should actually constitute  
24 biometric identifiers or information as defined by BIPA.

25 THE COURT: Okay. So I just got to pull up -- I had

1 it here a second ago. I just got to pull up Section 15 again.  
2 There it is.

3               Okay. Can somebody remind me where the definition in  
4 the statute of biometric identifiers is? What section is it?

5               MS. HERRINGTON: Yes. It's the section before.  
6 Scroll up 10, section 10, definitions. The first one is  
7 biometric identifier, and biometric information is the second  
8 definition.

9               THE COURT: Okay. So unsurprisingly, biometric  
10 identifier has sort of a laundry list of -- not terribly long  
11 laundry list, actually, but a laundry list of things that  
12 constitute biometric identifiers. And then biometric  
13 information has a definition too. So I guess the issue is --  
14 and this is what I want the plaintiff to address is, is your  
15 expert going to say that this thing that was collected is a  
16 biometric identifier, as BIPA uses that term, or is the expert  
17 going to say this is a fingerprint or this is a scan of a hand  
18 or it's a voice print or it's an iris scan? Or what are they  
19 going to say about that?

20               MR. KANOVITZ: For fingerprints, they say  
21 fingerprints. For biometric information, that's more of a  
22 generalized term, and they don't intend to say, therefore, you  
23 should find that it's biometric information under the act.  
24 But they're going to be describing, you know, mathematical  
25 ways of --

1                   THE COURT: It seems to me -- so the definition of  
2 biometric information, which is the second paragraph of  
3 section 10, which I'm looking at, it says: "Biometric  
4 information is any information regardless of how it's  
5 captured, converted, stored, or shared" -- and here's the  
6 definition -- "based on an individual's biometric identifier  
7 used to identify an individual."

8                   So, basically, I can imagine an expert getting up  
9 there saying, the information -- this particular information  
10 that I'm talking to you about, ladies and gentlemen, that I  
11 summarized on this PowerPoint here, constitutes information  
12 that would be used to identify an individual, and it's  
13 biometric because it involves a fingerprint or fingerprint  
14 data. That much -- I have a hard time seeing -- hang on a  
15 second. This is the downside of doing this at home. They're  
16 cutting grass on either side of my house. They just drove  
17 past. I'm going to close a window or two. Give me a second.

18                   I just want to make it clear I cut my own grass. Not  
19 that there's much to cut.

20                   So tell me how you expect it to come in through the  
21 expert, Mr. Kanovitz.

22                   MR. KANOVITZ: So the expert is going to talk about  
23 the fact that they captured fingerprints. He's going to talk  
24 about the fact that, you know, fingerprints are in the  
25 database and the equipment that they use. When he talks about

1 what is classified as biometric information there, he's going  
2 to talk about mathematical templates that correspond to the  
3 fingerprints, and he could use the term "mathematical." I  
4 mean, he could use the term "templates" instead of  
5 "information." But in both of the expert's depositions, in  
6 both of their reports, you know, they're using biometric  
7 information as information that relates back to the  
8 fingerprints.

9                   THE COURT: Okay.

10                  MR. KANOVITZ: Neither of them do I understand them  
11 to be saying that it's my legal opinion that this meets the  
12 definition of biometric information or the statute. He's not  
13 going to say that.

14                  THE COURT: Okay. Ms. Herrington, or whoever is  
15 going to argue this, are you hearing something in there that  
16 you think runs afoul of the rules?

17                  MS. HERRINGTON: No -- no.

18                  THE COURT: That's kind of the take I took on it too.

19                  I mean, I will say -- and I think everyone knows --  
20 that under 704, opinions on ultimate issues aren't  
21 objectionable for that reason alone. There's some exceptions.  
22 They don't really apply here. But, I mean, I think this is  
23 something that if there's -- if a question gets asked that  
24 runs afoul of it, then I think the time to deal with it is  
25 then. I think everybody knows what the rule is. And it kind

1 of sounds like the way it's going to be set up, it's not  
2 likely to be a problem. So I'm going to say that motion  
3 number 8 is denied without prejudice to an objection at trial.

4 Aftereffect, remedial measures.

5 Okay. The plaintiff argues the following. This is  
6 at least the way I understood it. BNSF, after the lawsuit was  
7 filed -- or some later point in time, doesn't have to be after  
8 the lawsuit was filed in 2020 whatever -- cut the system off.  
9 They stopped using it. And that's relevant, according to the  
10 plaintiff, to show who was in control of this system. That's  
11 the way I understand the argument.

12 Is that a relatively fair characterization,  
13 Mr. Kanovitz?

14 MR. KANOVITZ: That's a fair summary. That's  
15 control.

16 THE COURT: Okay. Talk to me about why on the  
17 defense side you think that would not be a proper use under  
18 Rule 407.

19 MR. DIAMANTATOS: It's not a proper use under 407,  
20 your Honor, because the plaintiffs' case has ample indicia  
21 that they plan on putting in as it relates to control. The  
22 issue of us turning off the biometric data and leaving it off  
23 to this day, in part, fueled by this lawsuit. As your Honor  
24 mentioned, we turn it off March of 2020. The suit is filed in  
25 May 2019.

1           That speaks directly to what Rule 407 prohibits, and  
2 it doesn't squarely speak to the issue of control. Therefore,  
3 the subsequent remedial measure rule applies, and the jury  
4 should not hear that it was turned off in March of 2020 and  
5 remains off as we sit there in trial in the Dirksen Federal  
6 building.

7           THE COURT: Was there something else that was put in  
8 in its place?

9           MR. KANOVITZ: Yes.

10           THE COURT: I'm asking, Mr. Diamantatos, what is it  
11 that was put into place?

12           MR. DIAMANTATOS: Biometric data is not being used.

13           THE COURT: Okay. So I don't -- it seems to me the  
14 fact that BNSF, which everybody is going to know, entered into  
15 a contract with Remprex to do this to begin with, the fact  
16 that they terminated the contract, that doesn't seem to me  
17 that that's terribly probative of much of anything. It's  
18 marginal probative value in addition to the other evidence is  
19 I think, really minimal. And if this was a 403 question, I'd  
20 exclude it that way. It just doesn't seem to me that it's  
21 significant evidence to prove control.

22           I will say this. This is really a caveat for the  
23 defendant. I guess, you know, I'm not going to say I didn't  
24 know that the system had been turned off because it's possible  
25 that over the three and a half years the case has been pending

1 it's been disclosed to me at some point in time, but I didn't  
2 remember it. I'll just make this observation. I propose  
3 something we talked about maybe 20 or 25 minutes ago. This  
4 would be a really good reason for you not to go really hard  
5 and heavy on the question of safety and security. Because if  
6 you took it out, I mean, if somebody gets up and talks about  
7 how we needed to have this biometric system for safety and  
8 security reasons, you're getting perilously close to opening  
9 the door to, well, that's not really true because we don't  
10 have it now. And, you know, the terrorists haven't won yet,  
11 or something along those lines.

12 MR. KANOVITZ: Judge, I think there's a  
13 misunderstanding about the facts.

14 THE COURT: Yeah. Okay.

15 MR. KANOVITZ: My understanding is the contract is  
16 not terminated. They simply told Remprex that they wanted  
17 them to perform the contract differently, which is an indicia  
18 of control. And what BNSF did then --

19 THE COURT: What's the differently? What was done  
20 differently?

21 MR. KANOVITZ: BNSF then created an app on the cell  
22 phone that says, you know, BNSF RailPASS is what it's called.  
23 You know how cell phones allow you to scan your fingerprint.  
24 So the fingerprint scan took place on the driver's cell phone  
25 at that point, so that it never comes -- never leaves the

1 possession of the driver and, therefore, doesn't trigger BIPA.  
2 And then that RailPASS app generates some kind of code or bar  
3 code or something that then gets scanned. That was all BNSF's  
4 doing. And Remprex continued to perform the contract. They  
5 just used the scan from the BNSF app instead of the scan of  
6 the fingerprint directly into the kiosk.

7 THE COURT: Okay. Does somebody want to talk about  
8 this on the defense side?

9 MS. HERRINGTON: Yes.

10 Go ahead. Sorry.

11 MR. DIAMANTATOS: I'll just jump in, Judge, and I'll  
12 defer to my colleague, Ms. Herrington. But, number one, the  
13 issue -- just to be sure, the issue of control only comes in  
14 once your Honor rules on the vicarious liability issue.  
15 Obviously, depending on how your Honor rules on that, I think  
16 will be illustrative of how this issue comes out. But,  
17 importantly, the way that plaintiffs' counsel laid that out,  
18 that's correct. We still have our contract with Remprex. The  
19 issue of security and implementing it and the means by which  
20 that's going to be put forth, that all has stayed the same.  
21 Us agreeing that Remprex should shut down the biometric data  
22 was in part because of this suit. And that's why we feel it  
23 falls squarely within the --

24 THE COURT: You know, what Mr. Kanovitz said doesn't  
25 really change my ruling on this. I will say, though, that it

1 causes me to reemphasize the caveat that I gave you a second  
2 ago, which was that, you know, people on the defense side had  
3 best be very, very cautious and careful about how you argue  
4 the safety and security issue because if it's tied to the  
5 system as it existed before the change was made and there's  
6 all this stuff about how we have to have -- I won't go into it  
7 in more detail. You start skirting pretty close to doing  
8 something that is going to make the availability of other  
9 mechanisms for doing the same thing that you actually used  
10 relevant and admissible even despite 407.

11 MR. DIAMANTATOS: We hear you loud and clear.

12 THE COURT: I'm not changing the ruling. I think  
13 it's the right ruling. But just, you know, the door could get  
14 open, so just be careful.

15 Number 10 is motive. I've already dealt with that.  
16 I don't need to say anything more than that.

17 Number 11 the golden rule argument. The plaintiff  
18 doesn't dispute that one; so that one's granted.

19 Arguments about sympathy. Yeah. Okay. That's fine,  
20 but I think that's better left for a specific objection to a  
21 specific point; so that's denied without prejudice to making  
22 an objection.

23 Legal opinions of witnesses. So my -- I guess my  
24 thought on that is that you don't really say what legal  
25 opinions you want me to exclude. So I assume it had something

1 to do with the expert, and I think, if that's the case, we  
2 probably talked that through well enough. Is there anything  
3 more that you had in mind that you thought was going to come  
4 in on the defense side that you're trying to preclude here?

5 MR. DIAMANTATOS: I think it does arguably, your  
6 Honor, go to a lay witness, not just expert --

7 THE COURT: Who is the lay witness?

8 MR. DIAMANTATOS: The plaintiff in the case. If he  
9 says that, you know, my biometric data was being collected,  
10 again, that's an issue that ultimately speaks to the legal  
11 definition of biometric data as it relates to the BIPA  
12 statutes. But that's the --

13 THE COURT: What you can do is you can rest assured  
14 that if something like that comes out of a lay witness' mouth,  
15 the jury will get an instruction from me that basically says,  
16 that's a question for you to decide, not a question for the  
17 witness to decide. He's speaking as an ordinary person. You  
18 have to decide this based on the instructions that I gave you.  
19 So I wouldn't worry too much about that.

20 Number 14, policies and procedures. So let's see  
21 here. So, yeah, on number 14, so the response basically  
22 says -- policies and procedures are kind of what the case is  
23 about. So is there some specific policy or procedure that the  
24 defense thinks is going to come in that you are asking me to  
25 exclude?

1                   MS. HERRINGTON: Your Honor, I guess I would say that  
2 there are lots of policies and procedures, but they don't have  
3 anything to do --

4                   THE COURT: Time out. This is a motion in limine.  
5 The motion in limine basically says, here's some evidence.  
6 Here it is right here.

7                   MS. HERRINGTON: Yes.

8                   THE COURT: You've given me something that's so broad  
9 that it could basically subsume the whole case, because the  
10 whole case is about BNSF's policies and procedures in some  
11 general way. So I need something more specific than that. I  
12 don't have a problem with deferring this one to, you know,  
13 specific, to specific testimony or exhibits at trial. But --  
14 that might make some sense because I could see it with a  
15 little bit more context that way. But in the form in which  
16 the motion was filed, it doesn't really tell me much.

17                  MS. HERRINGTON: It would be fine to defer this. As  
18 far as what the case is about, it's about whether we collected  
19 biometric data in violation.

20                  THE COURT: I understand. Whether you did that has  
21 to do with your procedures. And it has to do with your  
22 policies. So that's why the motion flipped the bread.

23                  MS. HERRINGTON: Okay. Fair enough.

24                  THE COURT: It's denied without prejudice to making  
25 objections to certain points.

1                   The last thing about the number of lawyers. First of  
2 all, you're not going to be able to have 20 people up there.  
3 We're going to talk about that when we talk about logistics.

4                   So comment on the size of the law firms or the number  
5 of lawyers is excluded for both sides. If something  
6 happens -- the plaintiff is expressing some concern in the  
7 response about opening the door. If, you know, BNSF comes in  
8 and basically says, we're just a poor country railroad that  
9 doesn't have any money, then, you know, maybe you can ask me  
10 at sidebar, you know, to let something in, but I don't expect  
11 that that's actually going to happen.

12                  So that one is denied without prejudice in making  
13 objections.

14                  Now we're to the big Kahuna -- that would be, for the  
15 court reporter's benefit, K-a-h-u-n-a, I believe is the  
16 correct spelling of Kahuna.

17                  So the vicarious liability thing, which is  
18 defendant's motion number 1. So let me just make a comment  
19 first. I don't agree with the proposition that vicarious  
20 liability has to be alleged specifically. So point A under  
21 this, subpoint A, I just don't think carries the day.

22                  As to the rest of it, based on the response, it's not  
23 clear to me whether the plaintiff is actually claiming  
24 something that I would categorize as vicarious liability;  
25 namely, that BNSF is responsible for what Remprex did and did

1 not do because they hired Remprex. That's the way I  
2 understand vicarious liability. Because I hired you, I'm  
3 responsible for what you did. So it's like if I'm a trucking  
4 company that hires a truck driver, I'm responsible for you if  
5 you drive negligently.

6 It's not clear to me that that argument is being made  
7 by the plaintiff -- or is going to be made by the plaintiff.  
8 Let me just ask that first to be sure.

9 Is the plaintiff going to be arguing -- is the  
10 plaintiff intending to argue that because BNSF hired Remprex,  
11 it's responsible for what Remprex did or didn't do?

12 MR. KANOVITZ: There are two arguments, and that  
13 would be one of them.

14 THE COURT: All right. So there's pretty much no  
15 controlling law on this. Right? Nobody has suggested that  
16 there's any controlling law in this. There's a couple of  
17 district court opinions that say things about it, not on  
18 point. And I'm just going to tell you that principles of  
19 federal statutory interpretation -- I think the defendant  
20 cites the securities cases about secondary liability. Yeah,  
21 I'm not sure that really governs here. I will tell you that  
22 I'm not terribly comfortable with making a ruling about this  
23 at the moment based on the briefing I've gotten. And I say  
24 that knowing, obviously, that I limited you in pages. And so  
25 I couldn't devote unlimited space to this.

1           But I would really like to see a little bit more on  
2 this, not here right now, but I'd like to see a little bit  
3 more on this. We've got, you know, four weeks before the  
4 trial is going to start. And so we've got a little bit of  
5 time to do that.

6           The thing that came immediately to mind for me --  
7 although, again, it's a federal statute, and Mr. Kanovitz  
8 probably is going to have some familiarity about this. I had  
9 to deal with a similar issue once a number of years ago in a  
10 TCPA case that I think Mr. Kanovitz or his firm were involved  
11 in. It was called -- oh, crap. I'm blanking on his name.  
12 The one involving the cruise company, cruise ship.

13           MR. KANOVITZ: *Birchmeier v. Carnival Cruise*.

14           THE COURT: The correct pronunciation turned out to  
15 be Birchmeier, it turns out.

16           Yeah, so I wrote something about vicarious liability  
17 there. Now, I have not looked back at that opinion, but I  
18 have some memory. A difference there would be that I think  
19 there was some guidance, some federal regulations about what  
20 might be under the general heading of vicarious liability and  
21 different routes to get there. But the Seventh Circuit may  
22 have eventually said something about that in the TCPA context.  
23 I'm not saying it definitely would govern here, but it's  
24 something that people might want to look at. I guess what I'm  
25 telling you is that I would really like to see a little bit

1 more on this.

2           It's going to come up more than one place. It's  
3 going to come up in the jury instructions. And as I'll talk  
4 about in a few minutes when we get to that point, my practice,  
5 as probably most of you know, is to give the jury instructions  
6 at the beginning of the case about what has to be proven both  
7 for the claims and defenses, not just at the end. So it's  
8 going to come up as an issue before we get all the way through  
9 the trial. And then, obviously, it's an issue on the  
10 admission of evidence too to some extent, but it's mostly an  
11 issue about argument.

12           So I guess I'd like to see a little bit -- here's  
13 what I'm going to ask you to do. I'm going to ask each side  
14 to give me, let's say, by next Monday -- not because I want to  
15 ruin your weekend, but because it just gives you a little bit  
16 more time. By next Monday, no more than ten pages just on the  
17 issue of what we're generally calling vicarious liability. So  
18 Mr. Kanovitz, a second ago that's one of the two routes. In  
19 other words, A hired B; therefore A is responsible for what B  
20 did. What's the second route?

21           MR. KANOVITZ: So I really see it as three routes,  
22 and the vicarious liability is sort of the outside scope of  
23 the second route, which is, under Illinois law, a corporation  
24 can only act through others. And so an act of someone that  
25 you ask to do an act on your behalf is an act of BNSF itself.

1 And the Illinois legislature would have had that bottom line  
2 when it passed the statute. So that's really 2/3. But I do  
3 think that they're different animals.

4 THE COURT: Is there a third point too?

5 MR. KANOVITZ: Yes, there is a third point.

6 THE COURT: Go ahead with the third point.

7 MR. KANOVITZ: Which is that an entity violates the  
8 statute -- it doesn't have to do all the collection itself.  
9 It has to take an active step towards collection, and that's  
10 the term that's used under Illinois law is "active step." And  
11 hiring someone to do that thing for you, our contention is, is  
12 an active step.

13 THE COURT: Got it. Okay. So here's what I want.  
14 No more than ten pages by next Monday. It's not a blind  
15 target for the defense at this point, so you basically just  
16 heard plaintiffs' counsel kind of articulate the alternative  
17 theory. So that's what I'd like to get from you by, let's  
18 say, 5:00 o'clock on Monday so nobody feels compelled to wait  
19 until 11:59 so they can see what the other side files. So  
20 5:00 o'clock central daylight time is the cutoff.

21 So we got a couple of other things to deal with, and  
22 they are the motions to strike.

23 Just a passing reference, they are motions in limine,  
24 and so they were subject -- I'm not going to insist on that  
25 here because I'd have to deal with this anyway. It makes

1 sense to deal with it now. It's not like I got twice the  
2 length or anything like that.

3 So, basically, here -- so it breaks down into two  
4 issues. One has to do with the plaintiffs' expert. That's  
5 Mr. Caruso. And the other has to do with these other  
6 witnesses, some of which are with third parties. I think most  
7 of those are Remprex people. And some of those are class  
8 members.

9 So let's talk about the class members first, and I  
10 have some questions for the plaintiff to start off with.

11 So in the response, you basically narrow it down to  
12 three people. And so here's what I want to know. What's the  
13 thrust of the direct examination on those people?

14 MR. LOEJVY: It would be limited, your Honor. I think  
15 it would be limited to the same way that Mr. Diamantatos said  
16 he wants to explain what happened and show what happened. I  
17 think the plaintiffs want to, from their perspective, explain  
18 what happened.

19 THE COURT: In other words, I drove into the lot, and  
20 this is what happens. This is what I'm asked to do. This is  
21 what I'm told to do.

22 MR. LOEJVY: And this is what I wasn't told.

23 THE COURT: Were you told that this was going to be  
24 stored in fact? Were you given a release? Was this  
25 happening? Did that happen? That kind of thing?

1                   MR. LOEVY: Right.

2                   THE COURT: Okay.

3                   MR. LOEVY: And I don't think we would call all  
4 three, your Honor. I think two. And the second one is a  
5 class member in the state court case.

6                   THE COURT: The court case, okay.

7                   Separate question having to do with the third-party  
8 people. And I don't know if it's seven or nine, but it's  
9 something in that vicinity. And I know these are all listed  
10 as "may call" witnesses, but which of those, as you sit there  
11 right now, understanding we're four weeks out from the trial,  
12 which of those are you actually intending to call?

13                  MR. LOEVY: Well, you hit it on the head, your Honor,  
14 that we were trying to be prophylactic and protect ourselves.  
15 Having been caught not ready to answer that question, you  
16 know, what we would propose is that you give us a short amount  
17 of time to identify two, and that we do that. And then they  
18 get deposed, if the defendants want to depose them. Our  
19 position, obviously, is that all seven are in play.

20                  THE COURT: Yeah. And you've made arguments along  
21 the lines of their identity was known, et cetera, et cetera.  
22 You don't have to re-argue that. Okay. So I'll come back to  
23 that.

24                  The other question I need to ask you -- no, I don't  
25 need to ask you anything about the expert. That's something I

1 need to ask the defense.

2           Okay. So let's break it down kind of the same way,  
3 starting off with the, you know, beyond the named plaintiff in  
4 this case, maybe one or two other -- hang on one second.

5           The one or two other class members that the plaintiff  
6 wants to call for what's described for the purpose of  
7 essentially saying, this is -- when I would go into the lot or  
8 the yard or whatever you call the thing -- I guess it's the  
9 yard -- this is what would happen, and I didn't get, you  
10 know -- I didn't get a disclosure. I didn't sign a release,  
11 and I wasn't told that this was happening and so on.

12           And I completely get that these people aren't listed  
13 in the 26(a)(1)s. I completely get that. So you don't have  
14 to repeat that. What I want to find out is -- it's likely to  
15 be pretty straightforward testimony, particularly when there's  
16 not a claim of actual damages in the case. Nobody's going to  
17 be getting up there and saying, you know, I lost my -- my  
18 identity got stolen as a result of this, or I lost credit, or  
19 anything like that. It's historical testimony about what  
20 happened going in and out of the yard. So articulate for me  
21 the prejudice if I let them do it now and let you take a  
22 deposition.

23           MS. HERRINGTON: Sure. I guess I would start with  
24 this is cumulative. The reason why there's a named plaintiff  
25 is because that's exactly what he's going to testify about.

1 We took his deposition. He's going to say exactly what they  
2 just described these other I guess now two people are going to  
3 say. We don't -- as you pointed out, we have not been able to  
4 depose these people. We just found out their names last week.  
5 It will be cumulative. It will be prejudicial. If they  
6 wanted to make these folks named plaintiffs, they could have.  
7 They elected to have one named plaintiff, Richard --

8 THE COURT: Right. So there's no rule that says only  
9 the named plaintiff gets to testify and none of the class  
10 members can't.

11 MS. HERRINGTON: Sure. But there's rules that say we  
12 get to know who the other people are.

13 THE COURT: Yeah.

14 MS. HERRINGTON: We didn't even know.

15 THE COURT: Like I said, you don't have to repeat the  
16 "I don't know" part.

17 MS. HERRINGTON: Sorry.

18 THE COURT: I got that part. I'm asking about the  
19 prejudice part.

20 MS. HERRINGTON: Well, I suppose the prejudice then  
21 would come to, you know, if we're then going to be deposing  
22 these folks on the eve of trial, despite the fact that, you  
23 know, we have lots of other things to prepare about. And we  
24 don't know exactly what these people are going to say. Is  
25 there something new that they're going to testify about that

1 leads to additional discovery we need to do? I think it's  
2 highly prejudicial to just insert two names out of 44,000. We  
3 never could have imagined that they'd pluck two out that are  
4 going to say whatever they are going to say and have to depose  
5 them on the eve of trial. So I think it's prejudicial.

6 THE COURT: Talk to me about the other third parties.  
7 The argument on these folks is that they were otherwise made  
8 known, admittedly not through the 26(a)(1)s, but their  
9 relevance was known to everybody through other means in the  
10 case. Talk to me about that.

11 MS. HERRINGTON: Sure. I disagree with that. If you  
12 look at the actual factual record, these people's names and  
13 the depositions that they cited were maybe named once. A  
14 couple of them were not named at all. Teresa Runge was never  
15 even discussed during a deposition. Lucas Krawczyk was on a  
16 calendar invite, and his name was read into the record. I  
17 mean, this was not -- were any of these folks --

18 THE COURT: Who was the person you said? Teresa  
19 somebody?

20 MS. HERRINGTON: Teresa Runge, R-u-n- --

21 THE COURT: Okay. I'm looking at it.

22 MS. HERRINGTON: Okay. We didn't find any deposition  
23 citations for her.

24 Several others on this list were just -- their names  
25 were mentioned. I might add they're all Remprex folks. So in

1 a lot of the cases they cite, you know, they cite cases where  
2 somebody actually is with the party.

3           These are former Remprex and I believe one current  
4 Nascent employee. As far as the documents, if you look at the  
5 BNSF documents that were produced, most of them, they weren't  
6 even mentioned in the BNSF documents. So they're now working,  
7 you know, just on the eve of trial, they're looking at the  
8 Remprex production, plucking names out. I don't know where  
9 these people are. We don't know what they do. Are they  
10 within the subpoena power? If we get to depose them, can we  
11 even issue a subpoena? I don't know. Maybe Mr. Loevy will  
12 say he's got them under his control.

13           THE COURT: I'll ask you a specific question about  
14 one of them. So, first of all, what is Nascent, as you  
15 understand it, how they fit in?

16           MS. HERRINGTON: They are the creator of this  
17 technology, and they license --

18           THE COURT: Got it. I have a specific question about  
19 the one person from Nascent who's identified here. Her name  
20 is Lynda, with a Y, Parillo, P-a-r-i-l-l-o.

21           MS. HERRINGTON: Yes.

22           THE COURT: Says in the plaintiffs' response that the  
23 defendant's expert interviewed her in preparing the report.  
24 And so the defendant was obviously aware that she had  
25 Ms. Parillo; that is, had relevant information for the

1 lawsuit. So what about that?

2 MS. HERRINGTON: That's fair. That's fair.

3 THE COURT: Do we know where Ms. Parillo is?

4 MS. HERRINGTON: I don't know. I believe she's out  
5 east somewhere. I think Nascent is --

6 THE COURT: Here's my question for plaintiffs'  
7 counsel, not about Ms. Parillo but about the Remprex people.  
8 What are we talking about here? Are we talking about you're  
9 actually planning to bring somebody in at the trial? Are  
10 these people within the subpoena power? Are any of them?

11 MR. LOEVY: And my co-counsel is -- correct me if I'm  
12 wrong. But I believe the people we listed are Illinois based,  
13 to the best of our understanding. They are within the  
14 subpoena power of the Court.

15 THE COURT: I'll give whoever co-counsel you are  
16 referring to as a chance to correct you if you're wrong.

17 MR. GERBIE: Your Honor, I believe counsel is right  
18 that the Remprex employees are Illinois based, within  
19 100 miles of the courthouse.

20 THE COURT: So I'm just going to ask this. And I  
21 don't care who answers it on the plaintiff side. Why didn't  
22 somebody take any of these depositions before? Or why didn't  
23 you disclose these people? It's not about taking the  
24 depositions. You want to disclose the witnesses. How come  
25 they weren't disclosed before?

1                   MR. LOEVY: I think we'd have to concede, your Honor,  
2 that they should have been. I will say, in answer to your  
3 question, if you look at Exhibit G, for example, counsel  
4 mentioned Runge. Exhibit G is an email exchange where they're  
5 talking about deposing Runge. So her name had come up in the  
6 context of counsel. So in that context, it's a little bit of  
7 a formality to say, well, she wasn't on our Rule 26 disclosure  
8 if she was discussed between counsel as a witness in the case.  
9 It's form over substance.

10                  MS. HERRINGTON: I'm sorry. I don't want it to sound  
11 like I was misrepresenting. To be clear, she's not mentioned  
12 in any depositions. And that Exhibit G, we asked plaintiff --

13                  THE COURT: That's what I understood you to say.  
14 That's what I got.

15                  MS. HERRINGTON: Okay.

16                  THE COURT: Okay. And so what are you intending to  
17 try to elicit from these Remprex folks?

18                  MR. LOEVY: Their names are on some of the documents  
19 that are our exhibits. You know, to tell you the truth, your  
20 Honor, I don't think this is going to be necessarily an  
21 important issue because I think there's -- you know, we'll be  
22 able to establish the foundation through a record keeper,  
23 et cetera. But their names are on some of the documents. We  
24 don't want to be boxed out. As usual, this might be a lot of  
25 to do about nothing.

1                   THE COURT: If what we're talking about here is  
2 needing foundations laid for exhibits for business records, I  
3 just want to be -- to kind of put a marker down on that one.  
4 I'm going to venture a guess -- and it's not really a guess;  
5 it's a highly educated guess -- that pretty much everything  
6 that got produced in this case was a business record within  
7 the meaning 803(6) of somebody. And I haven't gone through,  
8 because I don't typically before the trial go through all of  
9 the exhibit lists, because usually they're way too long and  
10 include stuff that people aren't going to put in. I haven't  
11 looked through there to see if there are foundational  
12 objections to exhibits.

13                   Has the defense made foundational objections to any  
14 of the Remprex-related exhibits?

15                   MS. HERRINGTON: I believe there are some, yes.

16                   THE COURT: Why?

17                   MS. HERRINGTON: Well, because the people are not  
18 going to be -- well, we didn't think are going to be  
19 witnesses. And if they authored something, there is no  
20 foundation.

21                   THE COURT: Okay. And how did the documents get into  
22 the case?

23                   MS. HERRINGTON: Sure. They were subpoenaed by  
24 plaintiff. So if there's internal documents between Remprex  
25 folks, we can't possibly say there's a foundation.

1                   THE COURT: Come on, seriously, Ms. Herrington.  
2 You've tried more than one trial in your life.

3                   MS. HERRINGTON: Sure. But they're third-party  
4 documents.

5                   THE COURT: Fine. Here's the ruling. If all we're  
6 talking about is foundation stuff, and that's kind of the --  
7 as it relates to the Remprex people, and it's kind of the gist  
8 of what I got from Mr. Loevy, it would be virtually impossible  
9 for me to determine that there is any cognizable harm to the  
10 defendant from the late disclosure.

11                  So here's what you're going to do. And "going to,"  
12 it means going to. You're going to either find a way to deal  
13 with the foundational objections to the Remprex exhibits, if  
14 plaintiff wants to call these people in order to lay the  
15 foundation for or I'm going to let them call some record  
16 keeper or record keepers from Remprex that can lay the  
17 foundation. And any of these people could qualify as a record  
18 keeper. There's no formal title that's required in that  
19 regard. We all know what's going to happen if that happens.  
20 It's going to be a complete waste of the jury's time and  
21 effort, and it's going to be a complete waste of your time.  
22 So figure out a way to deal with the foundational objections.

23                  My ruling on the class members is that given the  
24 nature of the testimony, I think with a deposition, I'm going  
25 to let you call up to two people in addition to the named

1 plaintiff, but only if that person is presented for a  
2 deposition, which is not to exceed 90 minutes. And if you use  
3 the whole 90, that means you've probably wasted 45. By next  
4 Wednesday, next Wednesday being the -- whatever that is, the  
5 13th. Next Wednesday, it's the 14th.

6 Then if what happens is that if the defendant can  
7 come back to me with a straight-faced legitimate motion or  
8 argument saying, well, now based on what we've heard in this  
9 deposition, if we had known this person was going to be  
10 called, we would have done A, B, and C, and you convince me  
11 that it's actually on square, then I'll consider excluding  
12 them. But I wouldn't put any -- you know, I wouldn't bet the  
13 ranch on that one. But I'll leave that open as a possibility.

14 So that's -- the only thing we got to talk about is  
15 Caruso, and my question is for the defendant on that. Let me  
16 just get back to that part of my notes.

17 Okay. So the argument on Caruso -- oh, and by the  
18 way, the plaintiff can call the person that the defendant's  
19 expert interviewed. I forget her name.

20 MS. HERRINGTON: Yeah. Okay.

21 MR. LOEVY: Your Honor, we may have to call that  
22 person by video. My understanding is she's out of the  
23 jurisdiction.

24 THE COURT: Okay. You just figure out if you really,  
25 really need her. We can do all that kind of stuff these days

1 without too much trouble. Let's not do it unless it's really,  
2 really needed.

3               Okay. So on Caruso, the plaintiffs' argument in  
4 response to the motion to strike, just in very 30,000-foot  
5 terms, is that the material, the information in question was  
6 all disclosed in substance within the confines of his report  
7 and his deposition. So address that, if you would, on the  
8 defense side.

9               MS. HERRINGTON: Absolutely, your Honor. That is  
10 absolutely inaccurate. Sitting here right now, they've got  
11 this new theory where they're talking about biometric  
12 captures. That was not the subject of the plaintiffs' expert  
13 report, his deposition, or the declaration in class  
14 certification. Yes, he mentioned biometric captures, but the  
15 testimony he gave, he gave an expert report that said there  
16 were 54,000 class members. He was wrong about that. After  
17 our expert came in, gave him a revised number, he accepted the  
18 revised number. As far as the number, it's 44,000 class  
19 members. And that's what your Honor certified. They've got  
20 this new theory, this biometric captures, that they're going  
21 to say, well, you know, here is this number.

22               But I have to tell you, I don't know what that number  
23 is.

24               THE COURT: I was just going to ask. What's the  
25 number?

1                   MS. HERRINGTON: No one knows. And you know what?  
2 It changes the complexity of this case dramatically for the  
3 client, dramatically. So we go from 44,000 folks to we're  
4 going to have him come up with some number. I mean, we would  
5 need an expert report --

6                   THE COURT: Slow down, slow down, slow down. Time  
7 out a second. I want to make sure I'm following you.

8                   So there's 44,000 class members. And what you're  
9 saying is that your understanding was that the damages that  
10 are sought are going to be 44,000 times whatever the number  
11 is. So far right?

12                  MS. HERRINGTON: If we're found liable, that is.

13                  THE COURT: Right. You heard the argument.

14                  MS. HERRINGTON: Yes.

15                  THE COURT: Now what you think you're being told is  
16 the number is not 44,000; it's a higher number based not on  
17 individuals but on number of times their data was captured.  
18 Am I understanding you right?

19                  MS. HERRINGTON: Precisely.

20                  THE COURT: And you're telling me you don't know what  
21 that number is.

22                  MS. HERRINGTON: Precisely. That was never part of  
23 the expert --

24                  THE COURT: "Precisely" is the equivalent of yes,  
25 which is all I was looking for there.

1           And you can't derive it from anything that's in  
2 Mr. Caruso's report. In other words, you can't take this  
3 number over here and multiply it by this number over here or  
4 back out that number over there and figure out what it is.

5           MS. HERRINGTON: We cannot.

6           THE COURT: As far as you know, at least.

7           MS. HERRINGTON: We cannot.

8           THE COURT: Okay. Stop right there. That's the  
9 point I want the plaintiff to respond to.

10           MR. KANOVITZ: Judge, first of all, the 44,000 number  
11 is his extraction of the unique number of people who were --  
12 had their biometrics extracted. He described the process of  
13 reaching that number, which included the fact that people were  
14 fingerprinted at different locations at multiple times.  
15 Our --

16           THE COURT: Basically, that's what you put in your  
17 response. He basically deduplicated the data.

18           MR. KANOVITZ: That's correct. So he's made clear  
19 that the data is the data and that the database itself records  
20 every single time that fingerprint was captured at  
21 registration. Now, so we disagree with their criticism of  
22 Caruso.

23           We also disagree with their attempt to limit us to  
24 proving the number of violations only through Caruso. There  
25 will be other witnesses.

1                   THE COURT: I don't think that's the argument here.  
2 The argument that's before me is a motion to strike testimony  
3 from Caruso. Okay? There's no motion in front of me, that  
4 I'm seeing at least, that says limit the plaintiff to 44,000  
5 times X. And in any event, that's not what I'm dealing with  
6 right now. I'm just dealing with Caruso.

7                   So here's my question for you. Can you find in  
8 Mr. Caruso's report somewhere the bigger number that he  
9 started off with before he deduplicated?

10                  MR. KANOVITZ: In his original report, you can find  
11 it -- I don't remember the exact number, but it's in the 50s.  
12 It's 56- or --

13                  THE COURT: The number Ms. Herrington referred to  
14 herself a couple minutes ago.

15                  MR. KANOVITZ: Which she said he admitted he was  
16 mistaken. He did not say he was mistaken. What happened was  
17 their expert came in and said, I used a different  
18 deduplication procedure. So then Mr. Caruso said, if I use  
19 their expert's deduplication procedure, here's what I get to.  
20 But that 56- or 58- or whatever it is, that represents  
21 individual scans.

22                  THE COURT: So that number is still out there. The  
23 56K is still out there somewhere.

24                  MR. KANOVITZ: Yes.

25                  THE COURT: Okay. Whatever that is, it sounds like

1 what we're talking about now is a bigger number than either  
2 one of those. Is there something in Mr. Caruso's report or in  
3 his deposition from which somebody could figure out what the  
4 bigger number was that he deduplicated from either to get down  
5 to 56,000 or to 44,000?

6 MR. KANOVITZ: Yes. He describes the databases that  
7 he received, which both sides' experts used. He describes  
8 what the contents of those are, and he describes that -- and I  
9 don't remember which particular database it was -- that this  
10 database has a list of each scan that was taken.

11 THE COURT: Okay. So let's kind of get down to the  
12 nitty-gritty here. So, look, if the number -- if the number  
13 he's going to say is 57,000, it might mean one thing. If the  
14 number is 157,000 or 257,000 or 357,000, it might mean  
15 something else. Altogether, so what's the number he's going  
16 to say?

17 MR. KANOVITZ: He's going to say the 56 as a number.

18 THE COURT: I get that. What's the bigger number  
19 he's going to say, the non-deduplicated number?

20 MR. KANOVITZ: I don't know the answer to that,  
21 Judge.

22 THE COURT: How can you not know the answer to that?  
23 Ask him --

24 MR. KANOVITZ: I'm not prepared --

25 THE COURT: Do you have a sense what multiple it is?

1 Is it twice as much? Is it five times as much? Is it ten  
2 times as much?

3 MR. KANOVITZ: Can I let other counsel answer --

4 THE COURT: I don't care who answers it. It doesn't  
5 matter. Fine.

6 MR. KANOVITZ: David, are you able to?

7 MR. GERBIE: Yeah.

8 Your Honor, our expert is prepared to testify as to  
9 the total number of biometric captures for the specific class  
10 in this case that was certified. His report also does  
11 specifically identify that for each driver, three fingerprints  
12 at a minimum were taken from each driver. So at a minimum --

13 THE COURT: Time out. Is the testimony going to be  
14 it's not 40- -- let's just take the 44- as a placeholder --  
15 it's not going to be 44-; it's going to be 44- times the index  
16 finger, the middle finger, and whatever the third one is  
17 called?

18 MR. GERBIE: Yes, your Honor.

19 THE COURT: The ring finger. That's what that one is  
20 called. Okay.

21 MR. GERBIE: I expect that he'll testify that for  
22 each driver, there's at least three fingerprint captures in  
23 associated biometrics.

24 THE COURT: Is that in his report?

25 MR. GERBIE: Yes, your Honor.

1                   THE COURT: Okay. So, Ms. Herrington, you're shaking  
2 your head. Is it in his report that for each driver, three  
3 fingerprints are captured.

4                   MS. HERRINGTON: I'll go back --

5                   THE COURT: I'll just tell everybody. This is a  
6 question with an answer. I don't necessarily expect everybody  
7 to have the entire report committed to memory, but it's a  
8 question with an answer.

9                   So, Mr. Gerbie, do you know what the big number is  
10 going to be, the one that we're talking about here now that  
11 the defense wants to exclude that you want to put in and  
12 nobody seems to know what it is?

13                  MR. GERBIE: Well, it will depend on how the Court  
14 interprets this question of biometric identifier, meaning  
15 fingerprint versus biometric information, meaning  
16 mathematical --

17                  THE COURT: You want the biggest possible. There's  
18 all sorts of permutations. I get that. What's the high end?

19                  Ms. Herrington, stop shaking your head. It's  
20 distracting.

21                  MS. HERRINGTON: Sorry. Sorry.

22                  MR. GERBIE: As I understand, the biggest possible,  
23 somewhere in the neighborhood of 300- to 600,000.

24                  THE COURT: Okay. So look -- let's just kind of talk  
25 about this in kind of very realistic terms. So, first of all,

1 I'm not going to -- nobody's asked me to make a ruling that  
2 Mr. Caruso was tied to the 44,000 figure as opposed to the  
3 56,000 if the 56,000 was in his report. That's a subject for  
4 cross-examination. If he goes with the 56, the defense can  
5 cross-examine him, you know, about how, you know, you backed  
6 off that number. Your methodology was wrong or whatever.  
7 That's not what we're talking about here. We're talking about  
8 something different.

9         The way as I understand it the plaintiff is going to  
10 argue this case is that whatever the number is of captures,  
11 we'll just call it captures, you multiply that by either a  
12 thousand if it's negligent or 5,000 if it's reckless. Okay.  
13 So if the number goes up, as Mr. Gerbie said a minute ago --  
14 and I recognize that there are some intervening issues in  
15 there that might have to be decided that might affect the  
16 bottom line number. But if the number goes up in the way that  
17 Mr. Gerbie suggested a second ago -- hang on a second. I just  
18 want to make sure I'm getting it right. Oh, I lost the feed.  
19 Dang. Okay. There it is.

20         300- to 600,000 is what the court reporter wrote  
21 down.

22         So we've now multiplied -- let's just talk 44,000 --  
23 let's say 56,000 and multiply it by a thousand. That's an  
24 easy one. It's 56 million. That's an easy one. If we now  
25 are talking about not 56,000 but five or six or ten times

1 that, it's not 56 million. It's potentially 560 million.  
2 That's a big deal. And even if it's -- even if it's near  
3 200 million, that's a big deal. That's a big difference.

4 And when Ms. Herrington says that this has a very  
5 significant impact on, you know, how the case gets approached,  
6 that's -- that's a pretty solid argument. Of course it does.  
7 I mean, you know, \$40 million is not walking around money. Or  
8 \$56 million is not walking around money. But sure as heck  
9 \$560 million is anything but walking around money, even for a  
10 railroad.

11 So I guess I see a problem if what we're talking  
12 about here is Mr. Caruso is not -- it's not that Mr. Caruso  
13 did this math or said this is how the math gets done, but  
14 rather he's now going to say this is how the math gets done.  
15 And the way you can figure out those numbers is you dig into  
16 the bowels of his report and the data that accompanied his  
17 report and the data that he relies on, and you can figure it  
18 out too. That's not really the way it's supposed to work.

19 It's not supposed to happen that an expert says that  
20 the number of violations of the law was 56,000 in his report  
21 and in his deposition, and then he comes in at trial and says  
22 it's 560,000. And it's not supposed to happen that way, and  
23 it's not going to happen that way. That's the bottom line.

24 MR. GERBIE: Your Honor, may I be heard on this  
25 briefly?

1                   THE COURT: I read a whole motion in limine, and I  
2 heard arguments from three lawyers, maybe two on this. So you  
3 have been heard more than briefly. If you have one more  
4 comment to make, go ahead.

5                   MR. GERBIE: I do. Your Honor, this is data that's  
6 been in defendant's possession. It's been in their possession  
7 for years. It's been in their possession --

8                   THE COURT: Why even bother with the report, then?

9                   MR. LOEVY: Our point, your Honor, is that, you know,  
10 we're arguing whether Caruso can say it or not. Our point is  
11 this is objective fact, and we're going to prove it at trial  
12 when Caruso --

13                  THE COURT: I'm talking about Caruso's testimony.  
14 I'm talking about Caruso's testimony. I made that clear at  
15 the beginning. The motion I have is a motion to strike  
16 testimony from Caruso. Okay? So if you want to not go with  
17 what Caruso says on this and take this bit of evidence  
18 combined with this bit of evidence combined with this bit of  
19 evidence combined with your legal theory and argue that it's a  
20 different number, I haven't been asked to preclude you from  
21 doing that -- okay? -- in this motion.

22                  I am looking at a motion that says, in its title and  
23 in its body, "strike plaintiffs' expert from offering  
24 undisclosed expert opinions at trial." And that motion is  
25 granted on this. Okay? I'm granting it because it's not

1       justified for the reasons that I just described. I'm not  
2 dealing with some other motions at this point.

3            Okay. I think I've now dealt with all the motions.

4            So we're going to talk about other stuff. Carolyn,  
5 would you like five minutes?

6            THE REPORTER: Sure.

7            THE COURT: She said sure. She typed "sure."

8            Everybody take five minutes.

9            (Short break.)

10           THE COURT: So there's one part of the motion  
11 relating to Mr. Caruso -- whoops. There we go. There we go.

12           There's one part of the motion relating to Mr. Caruso  
13 that I did not deal with. It's the other part. It has to do  
14 with -- let me just make sure that Carolyn is back on. Yeah,  
15 she is.

16           It has to do with his testimony -- the heading is  
17 "Testimony about BNSF's use of the database." And the  
18 response basically says that -- this is page 7 and the top of  
19 page 8 of the response. And, first of all, it says, well,  
20 you're misinterpreting the testimony. He's not saying what  
21 you say he's going to say. And what he is going to say is all  
22 in his report.

23           So I need somebody on the defense side to deal with  
24 that. Sorry for not picking that up before we took the break.

25           MS. HERRINGTON: No problem. And if their position

1 is he's not going to testify about anything beyond what he  
2 said in his report, that is fine. The way that the pretrial  
3 disclosure or the pretrial order draft read, it was that he  
4 was going to opine about how BNSF had access, which was not in  
5 his report. Rather, in his report he talks about the fact  
6 that there are some BNSF email addresses that he located, but  
7 nothing about whether or not someone from BNSF actually ever  
8 did access the Remprex database.

9 THE COURT: Okay. Can somebody on the plaintiffs'  
10 side respond to what Ms. Herrington just said?

11 MR. LOEVY: It sounds like a misunderstanding, your  
12 Honor. We stand on what we wrote. That's not what he's  
13 trying to do.

14 THE COURT: Okay. What is it that he is trying to  
15 do?

16 MR. LOEVY: He had access. And maybe I'll let Mike  
17 or Mr. Gerbie --

18 THE COURT: Go ahead.

19 MR. GERBIE: Yes, your Honor. His report does  
20 address BNSF's access to the data. And that is relevant  
21 because the emails identified that were BNSF employee email  
22 addresses were in a table within the database which identified  
23 them as auto gate system users. Meaning these are BNSF  
24 employees --

25 THE COURT: What's he going to say about this?

1                   MR. GERBIE: He's going to say that these BNSF  
2 employees, people with these BNSF email addresses, were  
3 registered users of the system.

4                   THE COURT: Okay. Now you've heard it,  
5 Ms. Herrington. Problem from your perspective or not?

6                   MS. HERRINGTON: I don't recall Mr. Caruso's report,  
7 but if that is what it said, we are fine with him testifying  
8 consistent with his report. I don't recall it saying that,  
9 but I would like a chance to go back and look now that I heard  
10 what Mr. Gerbie is saying.

11                  THE COURT: Okay. I mean, I'm looking. What he said  
12 is pretty much what's said on page 7 of the response that was  
13 filed, you know, last week.

14                  MS. HERRINGTON: Let me just pull that up.

15                  I just -- honestly, without going to the expert  
16 report, I don't recall if he said --

17                  THE COURT: The second part of the motion is denied.  
18 If I've just done something wildly wrong, then I'll get a  
19 motion to reconsider. Okay.

20                  MS. HERRINGTON: Thank you.

21                  THE COURT: Let's talk about other stuff. So, first  
22 of all, our start date, as I said, is going to be next -- not  
23 next -- October the 4th, which is a Tuesday.

24                  So the way that this will work is that I will get to  
25 you, probably about a week before that, a draft of the written

1 questionnaire, maybe a little bit more than a week before  
2 that, a draft of the written questionnaire that the jurors  
3 will fill out. And if you've tried a case in front of me  
4 before, which I know some of you have, you'll know what this  
5 looks like. Basically, it's two sides of a page. The front  
6 side is essentially basic background information about the  
7 person, where they live, where they work, and people that live  
8 in their household, what their hobbies are, and so on.

9                   The backside tends to be more pointed questions. I  
10 mean, it might be have you ever had your fingerprints scanned?  
11 Or it might be have you worked for any of the companies  
12 involved in this case, other things like that. I'll get those  
13 largely from your submitted voir dire questions. Those are  
14 just yeses and nos for the most part, and they're used as a  
15 basis for oral voir dire.

16                   We'll have the jurors -- because we're still in the  
17 mode where the jurors are coming in two days early to get  
18 COVID tested, they fill out the questionnaires then. And so  
19 we'll have the jurors -- just be ready to go at 9:00 o'clock  
20 in the morning on the day we start. And the jurors will be  
21 literally sitting down the hall in the courtroom that they'll  
22 be using as the deliberation and break room.

23                   They'll come in. I'll give them -- we should be able  
24 to get the whole venire in there. But here's what that means.  
25 Okay? This is on the assumption that we use my regular

1 courtroom, which is 2103.

2 We are still keeping jurors spaced out. I can get  
3 eight in the jury box. I can get -- if I use one side of the  
4 courtroom, I can get another approximately 12 or so over  
5 there. But in order to get the whole venire in there, which  
6 is about 30, I got to use both sides. So during voir dire,  
7 there's not going to be any space for anybody to sit in the  
8 gallery. It will just be the people who are sitting at  
9 counsel table. We'll talk about people sitting at counsel  
10 table in a second. So the whole room will be occupied.

11 There will be an overflow room that people can  
12 observe from by video, but that will just be for the first day  
13 and basically during voir dire.

14 So they'll come in. They'll sit in sequence. You'll  
15 have all their questionnaires. You'll have the list that  
16 tells what order they're going to be questioned in. We have  
17 them come up one at a time. When you get in there, if you  
18 haven't tried a case since COVID, the way the courtrooms are  
19 set up is there's -- we don't do sidebars anymore. The way  
20 that sidebars work is I turn on white noise. The lawyers and  
21 the court reporter and me put on little headphones, and we  
22 talk into microphones. And we can hear each other, but others  
23 can't hear us. There's only three sets of headphones at each  
24 counsel table. So a variation of that will be done for any  
25 private questioning that has to happen during voir dire,

1 which, quite honestly, in a case like this, there's not likely  
2 to be much of.

3           But in any event, the jurors will come up one at a  
4 time over to where you would have expected there to be a  
5 sidebar in the old days. There's a little kind of music stand  
6 over there that has a iPad on it. The reason the iPad is on  
7 it is if I have to ask the jurors a private question, we don't  
8 have headphones over there. So we turn on the white noise,  
9 and we see the realtime on the iPad. But we have them do all  
10 the questioning over there.

11           So, basically, they'll come up. I'll ask them  
12 whatever follow-up questions have to be asked. They'll go  
13 back to their seat. Rinse and repeat for, you know, however  
14 many jurors we think we need to talk to.

15           At the end of that process, I'll -- at sidebar again,  
16 which means headphones on and white noise, I'll ask you  
17 whether there's follow-up questions that you want me to ask to  
18 any particular jurors. Once all the questioning is done,  
19 we'll send the jurors out. I'm going to ask for challenges  
20 for cause right then. I'll hear argument on it, and I'll rule  
21 on them. Then you'll know who's left.

22           And then I'll give you a break, 15 or 20 minutes or  
23 something like that, to talk about peremptories. It's three a  
24 side. We're going to probably pick -- since the trial is  
25 going to span over -- probably span over parts of two weeks,

1 we'll probably pick ten jurors. So the first ten people on  
2 the list who aren't struck are the jurors.

3 There's no -- there's no rules on what sequence you  
4 do the peremptories on. In other words, you can strike Juror  
5 Number 21 first and Juror Number 2 second. And it's just the  
6 first ten people who aren't struck, either for cause or on a  
7 peremptory, that are the jurors.

8 We will have a jury before the lunch break.

9 Absolutely, without question, we will have a jury before the  
10 lunch break. And in a case like this -- I mean, it's not a  
11 police misconduct case where you have to ask all sorts of  
12 extra questions -- there's a good chance we'll have the jury  
13 enough before the lunch break that somebody's going to be  
14 doing an opening statement before the lunch break, and maybe  
15 both sides. So just be prepared to do that.

16 I don't need to ask you now because it's too far in  
17 advance, but I'll ask you then how long the openings are. And  
18 we'll figure that all out at that point.

19 The jurors during trial, there will be eight of them  
20 in the jury box kind of spaced out, and there will be two kind  
21 of in the second row -- if you can imagine what the pews look  
22 like on the jury box side of the courtroom, there will be two  
23 of them out there. And they'll be able to look off the big  
24 screen that will be adjacent to them to see any exhibits. The  
25 jurors in the jury box will all have screens in front of them.

1                   The way the tables are set up, with jurors in the  
2 gallery, what you would imagine, if you can, again, visualize  
3 what my courtroom looks like, the plaintiffs' table -- do I  
4 have -- I might have something like this I can share with you  
5 on my iPad. Let me see if I can find something here real  
6 quick. I'm closing in on it. Just give me a second.

7                   Yeah. Okay. I'm going to -- I think I can share the  
8 screen on my iPad. Let me see. I haven't tried to do that  
9 before. Let me see if I can do it.

10                  I got to go back and find this picture again. It's  
11 not going to let me do it. Never mind. Sorry about that.

12                  Anyway, if you can imagine what the plaintiffs' or  
13 the prosecution counsel table would look like, we don't use  
14 that one because it would cut the sight lines of the jurors  
15 who are sitting in the gallery. So there's going to be two  
16 counsel tables over at the other side. There's enough space  
17 at each of them for three or maybe four people, if you're  
18 squeezed in, but not for more than that.

19                  Once we get the jury selected, the whole side of the  
20 courtroom that no jurors are sitting on will be open. You can  
21 have people going in and out of there. You can have people  
22 moving in and out of the counsel table, if there's not enough  
23 room there and people need to move in and out.

24                  If you're going to have tech people, the advice is  
25 get them in there ahead of time so they make sure they're all

1 set up and know what they're doing. You can run the tech  
2 either from counsel table or from the podium.

3 And that's pretty much it. I mean, in terms of  
4 logistics. It's easier if you can see the stuff, so we'll  
5 come up with a date for people to come over and look. But  
6 that's basically how that all works.

7 Anyway, as I told you before, I give jury  
8 instructions at the beginning of the case before openings that  
9 describe not just the general stuff that jurors do but also  
10 what has to be proven. The jurors don't get copies of that,  
11 but they see them on screens. I will send you a draft of  
12 those probably also a week or a little bit less than a week  
13 before the trial. I'll ask for comments back just like I will  
14 on the questionnaires. I'll make adjustments. And then I'll  
15 give everybody a chance to make objections to the final  
16 version before opening statements. I give those before  
17 opening statements, and then, skipping ahead to the end of the  
18 case, I give the final instructions before closing arguments.  
19 And the jurors all have copies.

20 I allow jurors to ask questions. And there's a  
21 process for that. The jurors, you know, they have to write  
22 them out. They pass them up. They discuss them with you at  
23 sidebar. You can object to jurors' questions. They won't  
24 hear you object to them. I modify them as needed. I ask the  
25 questions to the witnesses, and then I give each side a chance

1 to follow up.

2 So as you sit there, do we think that we're going to  
3 need to take off the 5th for Yom Kippur?

4 MR. GERBIE: Yes, your Honor. There's at least a  
5 couple of folks from our side who will not be working.

6 THE COURT: Let's just figure we're going to do what  
7 we can on the 4th, which is going to include witnesses. So  
8 just have witnesses ready. The day is basically going to be  
9 9:00 to about 5:00 or 5:15. So just make sure we don't run  
10 short. We'll just tell the jury that we're recessing until  
11 Thursday for the religious holiday.

12 The following Monday, as you probably know, is  
13 Columbus day. So the Court is closed on that day. I had told  
14 you in the past, I think, that I had a trial following this  
15 one. That has now gone away. It was supposed to be out in  
16 Rockford. It's on the way to going away. I'll have time that  
17 following week, even though we'll only have three days the  
18 first week.

19 The next question I'm going to ask you is  
20 preliminarily to deciding whether I need to give you time  
21 limits or not. So as you sit there right now, what do we  
22 think in terms of how long it's going to take to try the case,  
23 given what I've told you about the length of the day and how  
24 long it will take to pick a jury and so on?

25 MR. LOEY: Your Honor, speaking with some

1 uncertainty, I think it fits in a week. I do. Not a calendar  
2 week, because we're --

3 THE COURT: I understand. Five days, in other words.

4 MR. LOEVY: That's my guess, your Honor, in fairness  
5 and candor.

6 THE COURT: Anybody think that's off?

7 MS. HERRINGTON: No, I don't think that's off. Five  
8 or six days.

9 THE COURT: I'm probably going to give you time  
10 limits anyway. Part of the reason for that is that we don't  
11 own our courtrooms as judges, and there are certain courtrooms  
12 that are set up with all the sidebar stuff. And those are the  
13 ones that get used for trial. So I get basically pushed aside  
14 for that courtroom when somebody has to try a case. And I  
15 have this kind of for a set period of time. And so I'm going  
16 to -- I'll enter an order probably later this week that talks  
17 about time limits and how they get calculated and so on.

18 And if it looks like it's going to be a squeeze, I  
19 can always drop the juror questions part of it, which,  
20 honestly, doesn't take up that much time anyway, but people  
21 kind of feel like it does, so I wouldn't have a problem  
22 dropping that. That's about it from my end.

23 Anything anybody wants to bring up or ask or whatnot?

24 MR. LOEVY: Your Honor, it sounds like the attorneys  
25 don't speak to the jurors at all during jury selection?

1                   THE COURT: Sadly, no.

2                   MR. LOEVY: Or happily.

3                   THE COURT: You get to tell them your names, so,  
4 yeah, to that extent.

5                   MS. HERRINGTON: I'm sorry. I missed this. I think  
6 you said you'd tell us later about the length of opening  
7 statement.

8                   THE COURT: Oh, no, I ask you how long they are at  
9 some point, but I don't need to ask that now. If you've  
10 already written the opening statement, I don't even want to  
11 know that because it's way too early. I'll ask you that  
12 closer to the trial.

13                  MS. HERRINGTON: Okay.

14                  THE COURT: Morning of trial. It's really just going  
15 to -- the only thing that's really going to influence is if we  
16 get the jury selection done at some reasonable point before  
17 the lunch, the question will be, how long are the openings  
18 going to take and should we do them before lunch or after  
19 lunch. That's basically all that's going to influence.

20                  MS. HERRINGTON: Sure.

21                  MR. LOEVY: Will all the trial days go until 5:15 and  
22 start at 9:00?

23                  THE COURT: Yes.

24                  MR. LOEVY: Those are big, full days. 9:00 to 5:00.

25                  THE COURT: They are. Yes, indeed, they are. Yeah.

1 Sorry. I just have to show up. You guys have to work. So it  
2 goes.

3 Okay. Let me think if there's anything else.

4 I mean, I know because I play a game that involves a  
5 little white ball where I happen to play with people who have  
6 had contact with all of you recently. I know that there are  
7 discussions going on. I guess the thing that I would ask --  
8 what I mean by that is settlement discussions. And I don't  
9 know anything about the details. I just know there's been  
10 discussions. And everybody gets very high marks from those  
11 people, by the way. I'll just add that.

12 All I ask is that, you know, if you look like -- if  
13 you feel like you're getting really close, just find a way of  
14 letting me know that. You know, call the courtroom deputy  
15 clerk and say, hey, we need a call with the judge. Because at  
16 some point, as we get closer, I'm going to have to be doing  
17 work on the jury instructions. And if I don't have to do it,  
18 I would prefer not to, in my dotage. So just let me know if  
19 you're getting in a range where you think it's likely to  
20 settle.

21 So in terms of coming over -- so is there anybody out  
22 of town that's going to be trial counsel in the case? I saw  
23 some appearances from some folks who were out of town, but I  
24 couldn't tell the extent to which they're going to be involved  
25 in the trial.

1                   MR. LOEVY: Not from plaintiff.

2                   MS. HERRINGTON: There will be a couple firm members  
3 that are from out of town, yes.

4                   THE COURT: But, I mean, just in terms of having this  
5 meeting where I show you how the setup works.

6                   Hey, Melissa, am I right that it looked like that  
7 that bench trial that was going to happen in there this week  
8 has now gotten moved?

9                   THE CLERK: That's correct, Judge.

10                  THE COURT: Okay. So here's what I would propose.  
11 That folks maybe come by -- to 2103, that is -- on Thursday.  
12 Let's say maybe something like 10:30 or so. It doesn't have  
13 to be everybody. Just enough people to just kind of get a  
14 feel for the layout. We're talking about 10 or 15 minutes  
15 max, just so I can show you how it's set up.

16                  Does that work all right?

17                  MS. HERRINGTON: That's great.

18                  THE COURT: Let's just plan on that.

19                  Then you're going to get me this additional brief on  
20 next Monday over what we're generically calling the vicarious  
21 liability issue, and I think that's about it.

22                  Anything anybody can think of that we need to talk  
23 about?

24                  MR. LOEVY: Judge, how many trial lawyers are you  
25 going to allow in the court at the table?

1                   THE COURT: Well, so here's basically how that works.  
2 I mean, it's a long-winded answer. So, first of all, as of  
3 right now -- and this is going to be the case when this  
4 lawsuit goes to trial -- we're still having jurors spaced  
5 apart, and we're still having jurors and other trial  
6 participants wear face masks. Okay? So I'm going to tell you  
7 why that is.

8                   First of all, it's roughly because it's the  
9 equivalent of a congregate setting, people don't get to  
10 volunteer to come in as jurors, and they're sitting 3 or  
11 4 feet from each other. We don't have them spaced 6 feet  
12 apart anymore. And it's part of trying to let people know  
13 that we're concerned about their safety.

14                  So -- and I'm going to get to your question. The  
15 rule for trial participants is going to be when you're  
16 talking, you don't have to wear a face mask; otherwise, you  
17 do. Part of the reason for that, honestly, is it's in your  
18 interest not to be perceived as being treated differently from  
19 the jurors. I will tell the jurors why it is that you get --  
20 people, when they're testifying or questioning or arguing,  
21 don't have to wear face masks. That will be explained.

22                  So now we're to your question. And so if the jurors  
23 perceive that they're being forced, as some of them will  
24 think, to sit 3 or 4 feet apart and other people aren't, then  
25 there's a chance that they're going to wonder about that and

1 might take umbrage at it.

2 So now I can explain some of it, but I'd have to ask  
3 as you a couple questions. Let me start with, how many people  
4 do you want to have at counsel table?

5 MR. LOEVY: I would defer to the defense side. They  
6 seem to have more. There are five total plaintiff lawyers. I  
7 don't think all five need to be at the table.

8 THE COURT: On the defense side, how many do you want  
9 to have at the table at any one point in time, understanding  
10 that people can switch in and out.

11 MS. HERRINGTON: Sure. I think two is fine. I don't  
12 know that we have more lawyers on our side.

13 THE COURT: What I would say is you can -- I think  
14 you can have four people at these tables, if they're spaced  
15 far enough apart, and it's not going to look like you're being  
16 treated differently from the jurors. That ought to  
17 accommodate people well enough. Like I say, it doesn't have  
18 to be the same people all the time.

19 Any other questions anybody has or points?

20 MR. LOEVY: Not from the plaintiff.

21 MS. HERRINGTON: Not for the defense.

22 THE COURT: Okay. So I want to have a check date  
23 with you. So I'm getting these briefs next Monday or next  
24 Tuesday. I'm going to be out of town. So I'm going to have  
25 you call in on Monday the 19th at, let's say, 9:45. My goal

1 is to be able to rule on the one last motion in limine by  
2 then. It's not a hard-and-fast ruling, but it's also just to  
3 kind of check in with you about any issues that people have.  
4 Okay. I think that does it then.

5 So thanks to everybody. And thanks, obviously, to  
6 Carolyn for -- Carolyn is my court reporter -- for sticking it  
7 out for two and a half hours.

8 All right. Everybody take care. Thanks.

9 MR. LOEVY: Thank you, your Honor.

10 MS. HERRINGTON: Thanks, Judge.

11 MR. GERBIE: Thanks, Judge.

12 (Which were all the proceedings had in the above-entitled  
13 cause on the day and date aforesaid.)

14 I certify that the foregoing is a correct transcript from  
15 the record of proceedings in the above-entitled matter.

16 CaroTyn R. Cox \_\_\_\_\_ Date  
17 Official Court Reporter  
Northern District of Illinois  
18 /s/CaroTyn R. Cox, CSR, RPR, CRR, FCRR

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